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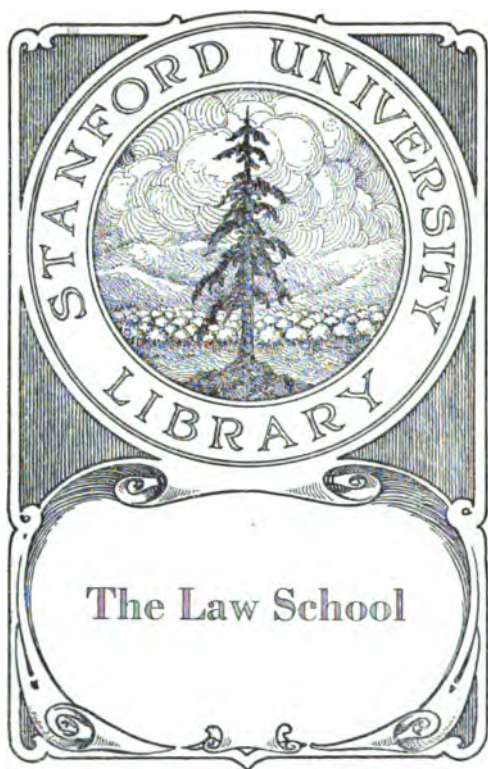
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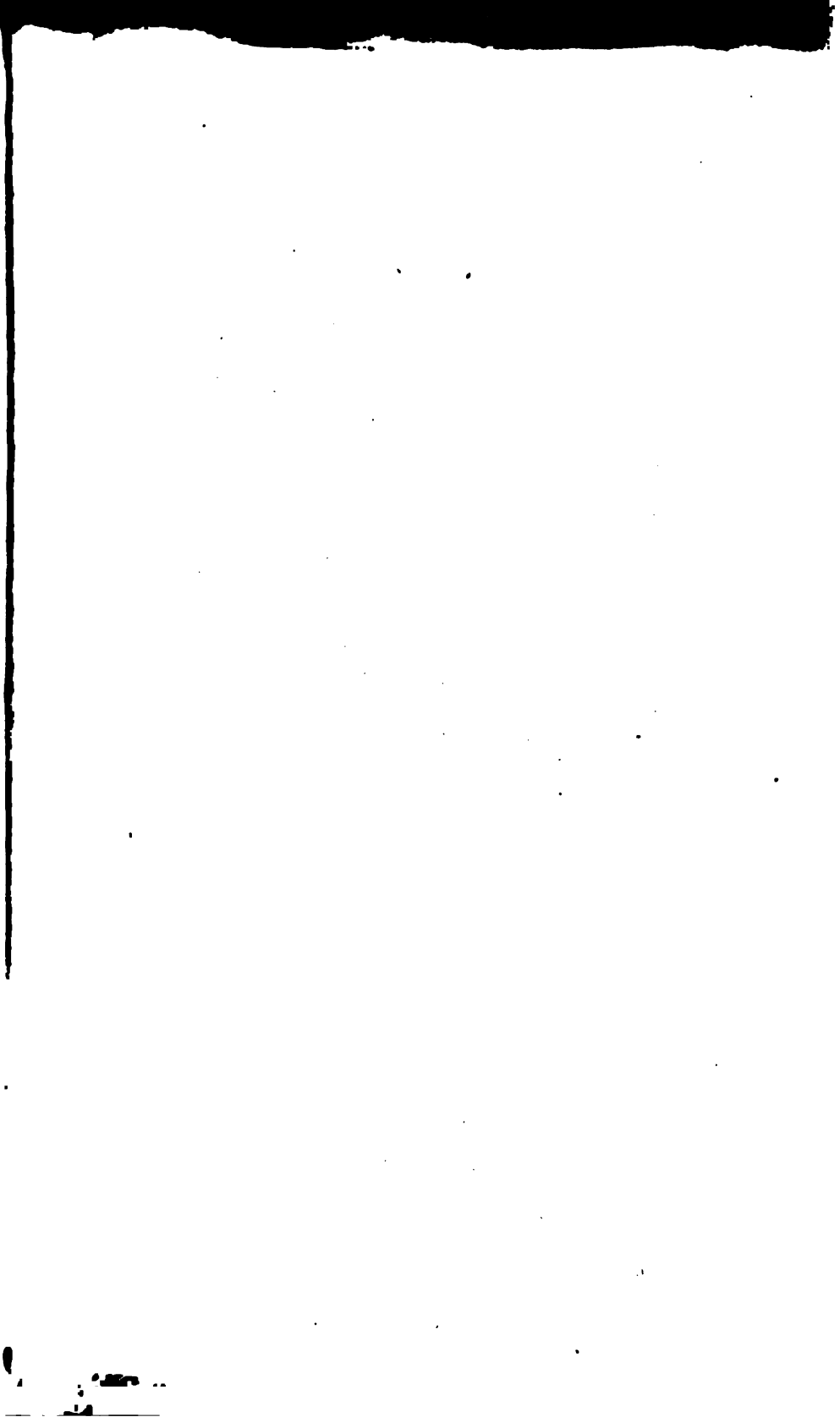
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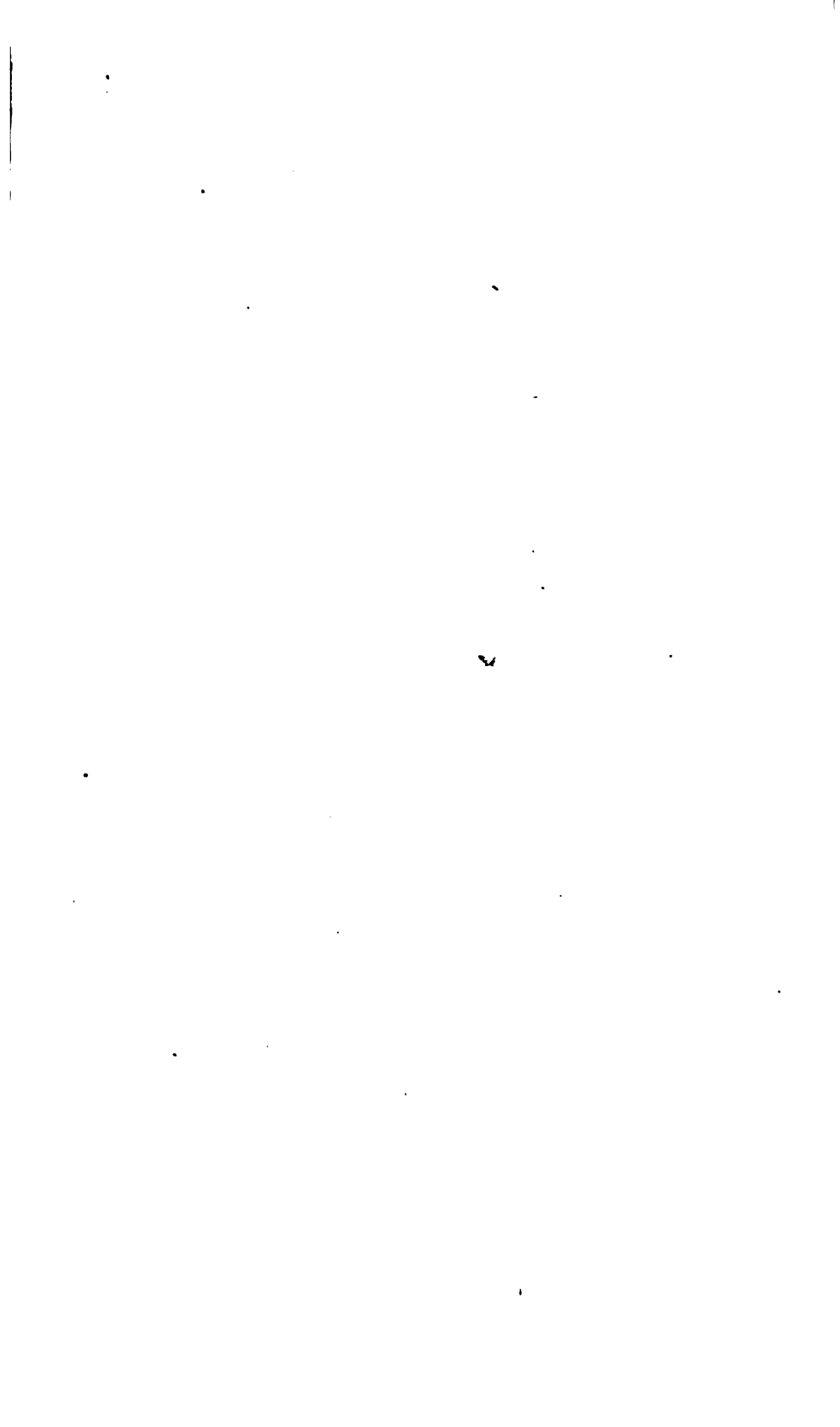
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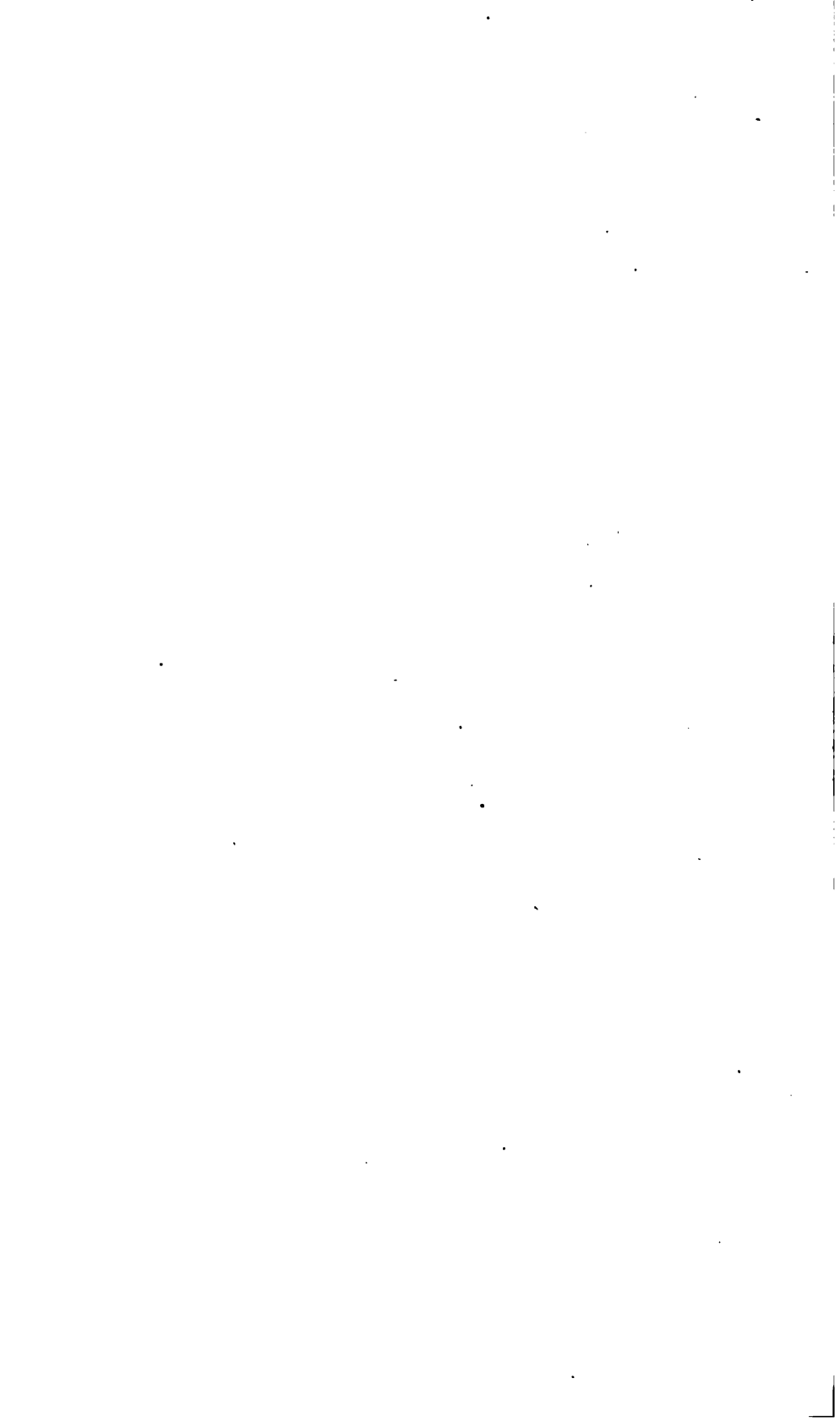
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ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

Willes

EDITED BY

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CONTAINING

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OF

THE COURT OF COMMON PLEAS,

DURING THE PERIOD OF THESE REPORTS.

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Lord Chief Justice.

The Hon. Sir CRESSWELL CRESSWELL, Knt.

The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.

The Hon. Sir RICHARD BUDDEN CROWDER, Knt.

The Hon. Sir JAMES SHAW WILLES, Knt.

ATTORNEY-GENERAL

Sir RICHARD BETHELL, Knt.

SOLICITOR-GENERAL

Sir HENRY SINGER KEATING, Knt.

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CASES.

ARGUED AND DECIDED

IN THE

COURT OF COMMON PLEAS,

(PURSUANT TO THE 17 & 18 VICT. c. 125, s. 66.)

AND IN THE

EXCHEQUER CHAMBER,

IN

Wilary Vacation,

IN THE TWENTIETH YEAR OF THE REIGN OF VICTORIA. 1857.

Willaspie

The Judges present, were,—

CRESSWELL, J.,
WILLIAMS, J.,

CROWDER, J.,
WILLES, J.

LEE and Others, Assignees of WILLIAM HAWKE, a Bankrupt, v.
SANGSTER and Another. Feb. 10.

The circumstance of an action having been brought by the assignees of a bankrupt without first obtaining the leave of the Court of Bankruptcy, pursuant to the 12 & 13 Vict. c. 106, s. 153, gives the court in which the action is brought no power to stay the proceedings on motion. Nor can the absence of such leave be pleaded as a defence to the action. Neither is it a ground of objection on the part of the defendant, that the name of the official assignee has been used without his consent.

THIS was an action brought in the names of the official assignee and the trade assignees in respect of a debt alleged to be due from the defendants to the bankrupt. The defendants had been summoned under the 120th section of the 12 & 13 Vict. c. 106, and admitted that they owed the estate 36*l.* 18*s.* 1*d.* (which sum they paid), [*2] the amount claimed being 48*l.*; and this action was commenced on the same day, to recover the entire sum.

Lush, on a former day in this term, moved for a rule calling upon the plaintiffs to show cause why all farther proceedings in this cause should not be stayed, on the ground that the action had been brought without first obtaining the leave of the commissioner, pursuant to s. 153, which enacts "that the assignees, with the leave of the court, upon application to such court, but not otherwise, may commence, prosecute, or defend any action at law or suit in equity which the bankrupt might have commenced and prosecuted or defended, and in such case the costs to which they may be put in respect of such suit or action shall be allowed out of the proceeds of the estate and effects of the bankrupt." He submitted, that, although there were no prohibitory words in the act, the policy of the enactment was sufficiently obvious; and he referred to *Dance v. Wyatt*, 6 Bingh. 486, 4 M. & P. 201, where (upon the statute 7 G. 4, c. 57, s. 16) the objection was taken as a ground of nonsuit. He further objected that the action had been brought by the trade assignees in the name of the official assignee without his consent. [CRESSWELL, J.—The trade assignees had a right to use the name of the official assignee, if he did not choose to interfere. Upon the other point there seems ground for a rule.]

Prentice, on a subsequent day, showed cause.—The 153d section of the 12 & 13 Vict. c. 106 is a provision for the internal management of the bankruptcy; and the only persons who can complain of a breach of it, are, the creditors, and such breach clearly forms no ground of *3] objection in the mouth of a defendant. It is placed in that *part of the statute which is introduced by the words,—“And with respect to the choice of assignees, and their rights and duties,” and is evidently intended as directory to them. It is somewhat similar to the provisions as to what shall be done or omitted to be done by the directors, contained in acts for the incorporation and regulation of public companies,—an instance of which is to be found in the case of *The Thames Haven Dock and Railway Company v. Rose*, 2 Dowl. N. S. 104. The 108th section of the company's act (6 & 7 W. 4, c. cviii.) provided that the business and concerns of the company should be carried on under the management of twelve directors, to be chosen from amongst the proprietors holding ten shares each, to whom the general management and control of the business of the company was intrusted, and who were authorized to do all things necessary or expedient for carrying on the business and concerns of the company, and to enforce, perform, and execute all the powers, authorities, privileges, acts, and things in relation to the said company: s. 112 provided, that, when and so often as any director should die or resign, or become disqualified or incompetent to act as a director, it should be lawful for the remaining directors to elect some other proprietor, duly qualified, in his place: s. 116 provided, that, at all meetings of directors five should be a quorum: and s. 123 enabled the company to sue for

calls. An action having been brought under the act for calls, the defendant (on the 8th of March) suffered judgment by default; and, on the 31st of May (in Trinity Term), he applied to set that judgment aside, on the ground, that, at the commencement of the suit, and during its continuance, the direction consisted of *seven* proprietors only instead of *twelve*. The court refused to interfere, as well on the ground of the delay in the defendant's application, as because the objection might have been raised by plea: and they *further held, that the provisions of the 108th and 112th sections of the act were directory [*4 only, and that the business of the company might well be conducted by seven directors, unless the shareholders should interfere to require the completion of the whole number; but that, at all events, those provisions were intended for the internal management of the company only, and could not be taken advantage of by a person in the position of a stranger. So, here, if there be anything in the objection, it should have been raised by plea; or, if it could be taken advantage of on summary application, such application should be addressed to the Court of Bankruptcy: Ex parte Magnus, 3 Mont., D., & De Gex, 693.(a)

Lush, in support of his rule.—The words of the 153d section are plain; and its object manifestly was, to prevent the estate of the bankrupt from being squandered by recklessly bringing actions. Under the 6 G. 4, c. 16, there was no power given to the assignees to summon debtors; nor any provisions giving them any control in the bringing or defending of actions. In this act, both are found: and the power conferred by the 120th section has been already exercised in this case. The only question is, whether this is a matter which the court can deal with upon motion. It clearly could not be *pleaded*; for, the consent of the Court of Bankruptcy might be obtained the next day. This, therefore, is the only way in which the objection can be presented. [CRESSWELL, J.—Is there not a provision somewhat similar to this in the Winding-up Act, 11 & 12 Vict. c. 45? *Prentice*.—The 60th section provides that “no action, suit, or other proceeding in any of Her Majesty's superior courts at Westminster or Dublin shall be instituted or brought or proceeded with by *the official manager, whether [*5 against a contributory of the company or any debtor or other stranger thereto, but with the leave or according to the general direction of the master, to be obtained in that behalf by the official manager, who shall accordingly apply for the same; and that no such action, suit, or other proceeding shall be proceeded with if the master shall, by writing under his hand, direct that the same shall be stayed or discontinued: Provided always, that the want of such leave as aforesaid shall not be set up as or in anywise constitute a defence to any such action, suit, or other proceeding.”] The provisions of the Winding-up

(a) See 6 G. 4, c. 16, s. 88; and see *Piercy v. Roberts*, 1 Mylne & K. 4, and *Jones v. Yates*, 3 K. & J. 373.

Acts are addressed to a totally different object. That which the legislature had in view here, was, to prevent the bringing of improper actions, and to give the control and management of the proceedings when commenced to the assignees. [WILLIAMS, J.—What is the consequence if the assignees sue without leave?] The assignees get no costs. [WILLIAMS, J.—They are to have costs only in the event of their suing with the leave of the court. COCKBURN, C. J.—Is it compulsory on the assignees to summon the debtor under s. 120?] Leave to sue is never given by the commissioner unless the party has been previously summoned. Here, the action was commenced on the very day on which the defendants were summoned to appear.

COCKBURN, C. J.—The point being a new one, we will take time to consider before we decide it. Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court.

This was a rule obtained in an action brought by the assignees of a bankrupt, to stay proceedings, on the ground that the plaintiffs had brought the action without having first obtained the leave of the Court *6] of *Bankruptcy, pursuant to the 153d section of the Bankrupt Law Consolidation Act, 1849,—12 & 13 Vict. c. 106.

The language of that section at first sight seems strongly to support the present rule; for, it enacts that “the assignees, with the leave of the court first obtained upon application to such court, *but not otherwise*, may commence, prosecute, or defend any action,” &c.

It was contended that the right of the assignees to sue, being a thing created by the act alone, must be taken with the qualification annexed to it by the act, viz. that they shall not have the right to sue, unless they shall have obtained the leave of the Court of Bankruptcy. But this argument would prove too much; for, it would show that the fact of no such leave having been obtained would furnish a good plea to the action, and, consequently, that the present rule was misconceived.

On consideration, however, we are satisfied that the statute intended to make the obtaining of the requisite leave a matter only between the assignees and the Court of Bankruptcy, and not at all between the assignees and the other party to the suit. The enactment, it must be observed, extends to the defence by the assignees of actions which the bankrupt might have defended, as well as to the commencement and prosecution of actions which he might have commenced and prosecuted. And, if the assignees were to defend such an action without having obtained the leave of the Court of Bankruptcy, it is difficult, if not impossible, to suggest how the court of common law in which the action was pending could interfere with the defendants' proceedings.

If the assignees neglect to obtain the requisite leave to sue or defend, the act provides that the costs to which they may be put shall not be *7] allowed out of the *bankrupt's estate. And the Court of Bankruptcy may, it should seem, under the general powers conferred by the act,

make such orders on the assignees with respect to the cause, as the court may deem right. But it appears to us that no recourse can be had to the court of common law in which the cause is pending.

We therefore think this rule must be discharged, but without costs.

Rule discharged, without costs.

WHITE v. THE GREAT WESTERN RAILWAY COMPANY.

Feb. 20.

In an action against a railway company for negligence in forwarding goods, whereby they lost a market, the declaration alleged that the defendants were common carriers, and received the goods in question to be carried by them *as such common carriers* for hire and reward. Plea, traversing the averment that the defendants received the goods *as common carriers*. It appeared in evidence that the defendants did not receive any goods to be carried by them, unless the consignor signed a paper containing various conditions, subject to which they were to be carried. The judge, holding that the conditions were reasonable, and the contract a special contract within the 77 & 18 Vict. c. 31, s. 7, and that consequently the defendants did not receive the goods to be carried by them *as common carriers*, directed a nonsuit:—
Held, that the nonsuit was right.

THIS was an action against the Great Western Railway Company charging them, as common carriers, with negligence in the conveyance of goods, whereby they arrived at their destination too late for the market.

The declaration stated that, the defendants being common carriers by railway for hire, the plaintiff, on the 12th of November, 1855, caused to be delivered to them, at their request, and they accordingly then received from the plaintiff, a quantity of cheese, to be by them, as such common carriers, carried and conveyed on a certain railway, from Bath, to wit, to Basingstoke, for hire and reward then paid by the plaintiff to them in that behalf: yet the defendants, by the negligence and default of themselves and their servants, wrongfully, and contrary to their duty in that behalf, neglected and omitted to *carry or convey the said cheese as aforesaid for a long and unreasonable time in that behalf; [18] and, by means thereof, the plaintiff lost a market for the sale of the said cheese, and was obliged to sell the same at a subsequent market, for a less sum of money than he could and would have done had the defendants carried and conveyed the said cheese as aforesaid within a reasonable time in that behalf; and the plaintiff was also necessarily put to great expense in and about the endeavouring to procure and in procuring the defendants to carry and convey the said cheese from Bath to Basingstoke aforesaid, and in and about necessary travelling to and from the said market by reason of the premises, and which became and were thereby wholly useless: Averment that all conditions precedent and all matters and things necessary to entitle the plaintiff to maintain the action, had happened and existed before suit: And the plaintiff claimed 50l.

The defendants pleaded,—first, that the plaintiff did not cause to be delivered to the defendants, nor did they receive from the plaintiff, the said cheese, to be by them carried and conveyed as alleged,—secondly, not guilty,—thirdly, that the said cheese in the declaration mentioned was delivered by the plaintiff to, and accepted and received by, the defendants, to be carried and conveyed under and subject to a certain contract and condition, which rendered them not liable for the loss, damages, or expenses in the declaration mentioned, to wit, *that the company would not under any circumstances be liable for loss of market or other claim arising from delay or detention of any train; whether at starting, or at any of the stations, or in the course of the journey, and that the company did not undertake to send goods by any particular train, if there were an insufficient number of trucks at the station, or the trucks* *9] *could not be conveniently used for the purpose, notwithstanding the goods might have been taken to the station before the time appointed by the company;* and that the plaintiff's claim was a loss within the true intent and meaning of the said condition, and not otherwise,—fourthly, that, at the time of the delivery of the said cheese to the defendants as aforesaid, the plaintiff agreed to bear the risk of all loss or damage relating to the carriage or conveyance of the said cheese, in consideration of the defendants charging him at a reduced rate for the carriage thereof; and that the plaintiff was accordingly charged at such reduced rate, and the said cheese was carried and conveyed by the defendants under and subject to that agreement, and not otherwise; and that the loss or damage in the declaration mentioned was and is part of the loss or damage agreed to be borne by the plaintiff as aforesaid, and not any other loss or damage.

The plaintiff joined issue upon each of the above pleas: And, for a further replication to the third plea, the plaintiff said that the contract in the declaration mentioned was made and entered into after the passing and coming into operation of the Railway and Canal Traffic Act, 1854, (17 & 18 Vict. c. 31), and that the said contract and condition in that plea mentioned was and is unjust and unreasonable within the true intent and meaning of that statute: And, for a further replication to the fourth plea, the plaintiff said that the agreement in that plea mentioned was made after the passing and coming into operation of the same act of parliament, and was and is a special contract within the true intent and meaning of the 7th section of the said act; and that such agreement was not signed by the defendants or by the person delivering the said cheese for carriage, as by the said act of parliament is required in that behalf.

The plaintiff also new assigned, to the third plea,—that he sued the *10] defendants in this action not only for *the loss arising as in that plea mentioned*, but also for that the defendants, after they had received into their custody the said cheese for the purpose of so carrying

and conveying the same as aforesaid, wrongfully neglected and omitted to commence or set about the carrying and conveying of the said cheese; and wrongfully delayed so doing for a long and unreasonable time in that behalf, and not in consequence or by reason of any such delay, detention, or cause as in that plea mentioned; and to the fourth plea,—that he sued the defendant in this action not only for the loss arising as in that plea mentioned, but also for that the defendants, after they had received into their custody the said cheese for the purpose of so carrying and conveying the same as aforesaid, wrongfully neglected and omitted to commence or set about the carrying or conveying of the said cheese, and wrongfully delayed so doing for a wrong and unreasonable space of time in that behalf, and not during the risk, carriage, or conveyance in that plea mentioned, and that the loss occasioned to him the plaintiff by such last-mentioned wrongful act was other than and no part of the loss in that plea mentioned.

The defendants took issue on the replications to the third and fourth pleas, and pleaded not guilty to the new assignments.

The cause,—which was originally commenced in the county court of Bath, and removed by certiorari,—was tried before Channell, Serjt., at the last Summer Assizes for Somersetshire. The facts were as follows:—The plaintiff, who is a farmer residing at Timsbury, in the county of Somerset, being desirous of forwarding a quantity of cheese to Bishopstoke, in the county of Hants, for sale at the market to be held there on Thursday, the 15th of November, 1855, caused it to be sent to the Bath Station of the Great Western Railway on Monday, the 12th, paying the carriage to Basingstoke (where the *Great [*11 Western Railway joins the South Western line leading to Bishopstoke), and directing the servants of the Great Western Railway Company to forward it to its destination, which they assured him it would arrive at in time for the next Thursday's market. Relying upon this assurance, the plaintiff went on the 15th to Bishopstoke to attend the market, but the cheese did not arrive; and this action was brought to recover 26*l.* for the loss and expense incurred by the plaintiff in consequence.

It appeared that the course of transit from Bath to Bishopstoke, is, by the Great Western Railway from Bath to Reading, and thence to Basingstoke, and from Basingstoke by the South Western Railway to Bishopstoke; that, in the ordinary course, the plaintiff's cheese should have started from Bath at 10 P. M., on Monday, arriving at Bishopstoke some time on the following day; but that, in consequence of the engine being of insufficient power to propel the whole train of trucks, the cheese was not forwarded from Bath until 4.30 P. M. on Tuesday; that it arrived at Reading on Tuesday night, and might have been sent on to Basingstoke at 5.30 A. M. on Wednesday, but, in consequence of the insufficiency of the "staff" at Reading, it was detained there till

5.30 A. M. on Thursday, and consequently did not arrive at Bishopstoke until the market was over.

It further appeared, that, at the time the cheese was delivered at the Bath station, the plaintiff received from the station master a receipt for the carriage (2*l.* 12*s.* 11*d.*) of which the following is a copy:—

“ GREAT WESTERN RAILWAY.

“ Bath Station. Nov. 12th, 1855.

Name and Address of Consignee.	Goods or Cattle.	Tons.	cwt.	qrs.	lbs.	£	s.	d.
White,	100 cheese.	2	5	0	0	2	12	11
Bishopstoke.	S[tation] to S[tation.]							
Owner's risk.	Delivery.					2	12	11

*[12] “Received two pounds twelve shillings and eleven pence for conveyance of the above goods to Basingstoke on the conditions stated on the other side.

“ For the Great Western Railway,

“ JOHN THOMAS.”

The conditions printed at the back of the receipt (and to which the plaintiff affixed his signature), were (amongst others) as follows:—
“*Ninthly*, that they [the company] will not under any circumstances be liable for loss of market or other claim arising from delay or detention of any train, whether in starting, or at any of the stations, or in the course of the journey. The company do not undertake to send goods by any particular train if there be an insufficient number of trucks at the station, or the trucks cannot be conveniently used for the purpose, notwithstanding the goods may have been taken to the station before the time appointed by the company.”

On the part of the defendants it was submitted that the goods were not received by them “as common carriers,” as alleged in the declaration, but upon the special terms endorsed on the receipt and signed by the plaintiff.

For the plaintiff it was insisted that the conditions were unreasonable and therefore void by operation of the 7th section of the Railway and Canal Traffic Act, 1854,—17 & 18 Vict. c. 81; and consequently that the contract must be treated as unconditional.

The learned judge, upon the authority of the case of *Hughes v. The Great Western Railway*, 14 C. B. 637, ruled that the defendants did not undertake to carry the goods in question as “common carriers,” but upon the special terms mentioned in the conditions; and he accordingly nonsuited the plaintiff.

Kinglake, Serjt., in Michaelmas Term last, obtained a rule nisi for

a new trial, on the ground that the condition under which the cheese was received by the defendants, *viz. that they the defendants did not undertake to send goods by any particular train, &c., did [*18 not apply to and disprove the cause of action upon the facts proved, and that the case ought to have been left to the jury.

Butt, Q. C., and Montague Smith, Q. C., in Hilary Term last, showed cause.—The material question is, whether the cheese was received by the defendants under a contract as common carriers or under a special contract. The 7th section of the 17 & 18 Vict. c. 81, enacts, that "every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivery thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or limitation being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable: Provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned,—that is to say, for any horse, 50*l.*, for any neat cattle per head, 15*l.*, for any sheep or pigs per head, 2*l.*,—unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the *increased risk and care thereby occasioned, [*14 a reasonable per-centage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such per-centage or increased rate of charge shall be notified in the manner prescribed in the statute 11 G. 4 & 1 W. 4, c. 68, and shall be binding upon such company in the manner therein mentioned: Provided also, that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: Provided also, that no special contract between such company and any other parties, respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things, as aforesaid, shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage: Provided also, that nothing herein contained shall alter or affect the rights,

privileges, or liabilities of any such company under the said act of 11 G. 4 & 1 W. 4, c. 68, with respect to articles of the descriptions mentioned in the said act." Here, the goods were received upon a special contract within that section; consequently, the first plea was proved, and the nonsuit was right. [CRESSWELL, J.—The plaintiff contends that the special contract did not relieve the defendants from their ordinary liabilities as common carriers.] It may be that some of the stipulations are unreasonable, but still that will not affect those that are reasonable, or make the contract the less a special contract. In *The York, Newcastle, and Berwick Railway Company, App., Crisp., Resp.*, 14 C. B. 527 (E. C. L. R. vol. 78), pigs were delivered by A. at a railway station at Alnwick, to be carried to Newcastle, A. paying the carriage, and receiving a ticket, intimating the terms upon which alone the *15] company *undertook to carry them, one of which was, that "the company be not responsible for the non-delivery of the stock within any certain or reasonable time, nor in time for any particular market, nor are they required to forward by any particular train." In an action by A. against the company, in the county court, for injury to the pigs from delay in the conveyance of them, the judge left it to the jury to say whether the company received the pigs as common carriers for hire for carriage, or whether they received them under the special contract set forth in the ticket. The jury having found against the company,—this court, on appeal, held that the judge had misdirected the jury, inasmuch as there was *no evidence whatever that the company had received the pigs upon any other contract than that set forth in the special contract*. That was followed by the case of *Hughes v. The Great Western Railway Company*, 14 C. B. 637 (E. C. L. R. vol. 78): it was there proved, that, when the pigs were delivered to the defendants, the plaintiff signed a note in which it was stipulated "that the defendants would not be liable or responsible for the carriage or delivery of the pigs within any certain or definite time, nor in time for any particular market;" and the learned judge, holding that the contract alleged in the declaration,—which charged the defendants as common carriers, and alleged a breach of duty in not delivering the pigs *within a reasonable time*,—was not proved, nonsuited the plaintiff: and the court upheld the nonsuit. The decision in these cases is in strict accordance with all the rules of pleading: and the recent statutes make no difference. *Shaw v. The York and North Midland Railway Company*, 13 Q. B. 347 (E. C. L. R. vol. 66), is an authority to the same effect. [COCKBURN, C. J.—The statute does not make the company cease to be common carriers, though it somewhat lessens their liability as such.] The question here is, not what character the company bears *16] generally, but what is the *nature of the contract they have here entered into. If a special one, it ought to have been declared on as such, and the question as to the reasonableness of the conditions

under s. 7 does not arise: see *Simonds v. The Great Western Railway Company*, and *The London and North Western Railway Company*, App., Dunham, Resp., 18 C. B. 805, 826; *Wise v. The Great Western Railway Company*, 1 Hurlst. & N. 63;† *Pardington v. The South Wales Railway Company*, 1 Hurlst. & N. 392, 26 L. J. Exch. 105.† In this latter case, Bramwell, B., says: "I think the proper construction of the act, is that the company shall not be allowed, by giving general notices, conditions, or declarations, to free themselves from liability for the loss or injury to the cattle carried by them, but that they may do so by making such conditions as shall appear just and reasonable; and that is quite consistent with their making a special contract with the party for whom they carry, with a view of protecting themselves from liability. It would be quite monstrous to say that such a bargain might not be made between man and man. It seems quite reasonable that the company should say, 'We will not be liable for any injury done to the cattle by our servants.' They receive a smaller sum for the carriage of the cattle in consequence of their being exempt by the contract from liability; and it would be very strange if we were to hold, that, after such a contract was made, the owner of the cattle might recover. I think the question of reasonableness under the statute does not arise: but, if it does, I think that such a notice would be reasonable."

Kinglake, Serjt., and *Prideaux*, in support of the rule.—There was abundant evidence to show that the injury complained of arose from the negligence of the company's servants. [CRESSWELL, J.—Do you say that all the conditions are unreasonable?] They clearly are *unreasonable; and therefore the contract must be treated as [*17 unconditional. [CRESSWELL, J.—If any part be reasonable, the contract upon which the goods were delivered to the defendants was not simpliciter the contract declared on. If there be any exception out of the ordinary responsibility of a common carrier, the declaration that the defendants contracted as common carriers is not made out: *Latham v. Rutley*, 2 B. & C. 20 (E. C. L. R. vol. 9), 3 D. & R. 211 (E. C. L. R. vol. 16).] *Latham v. Rutley* was not an action founded upon the breach of duty, but an action of assumpsit, and therefore not applicable here. The liability of the company as common carriers can only be varied by the express provisions of the act, or by some special contract not at variance with its provisions. [COCKBURN, C. J.—There is no contract at all here but the special contract proved.] The fact of their having made a special contract, does not relieve the company from the duty arising from their public profession,—*Denton v. The Great Northern Railway Company*, 5 Ellis & B. 860 (E. C. L. R. vol. 85),—or exempt them from responsibility for negligence: *Wyld v. Pickford*, 8 M. & W. 448.† It was therefore competent to the plaintiff to declare generally as he has done here: for, it is always sufficient for a plaintiff, to allege so much of a contract or of a duty for the breach or non-

performance of which he complains: *Cotterill v. Cuff*, 4 Taunt. 285. So here, the duty to carry and deliver within a reasonable time arises out of the defendants' position as common carriers, and it was not necessary to show in the declaration that it was subject to any exceptions or qualifications. [COCKBURN, C. J.—In *Hughes v. The Great Western Railway Company*, it was distinctly held that the circumstance of the company having received the pigs under a special contract was not consistent with the allegation that they received them as common carriers to deliver within a reasonable time. That case is precisely *18] in point. The special contract there *differs in no degree from the contract proved here.] The circumstances of that case were very peculiar: the learned judge thought there was no evidence for the jury; and the counsel for the plaintiff, acquiescing in that ruling, consented to be nonsuited. The first part of the 17 & 18 Vict. c. 31, s. 7, imposes upon the company the liability of common carriers; and they are only enabled to get rid of the effect of that, by showing that their *prima facie* liability is limited by a special condition which the court or judge shall deem just and reasonable, and which shall be in writing, and signed by the party. In *Simonds v. The Great Northern Railway Company*, 18 C. B. 805 (E. C. L. R. vol. 86), there was a plea setting up the special contract, with an averment that the loss arose out of the circumstances provided against by the special contract. Indeed, in all cases since the passing of that act, the special contract has been pleaded. [COCKBURN, C. J.—How do you find the cases before the act, where the carrier's liability was limited by notice?] The practice was to declare generally, leaving the carrier to set up the qualification or restriction,—*Clarke v. Gray*, 6 East, 564: but such notice did not protect the carrier against the consequences of gross negligence or felony of his servants: *Bodenham v. Bennet*, 4 Price, 81; *Birkett v. Willan*, 2 B. & Ald. 356; *Syms v. Chaplin*, 5 Ad. & E. 634 (E. C. L. R. vol. 27); *Butt v. The Great Western Railway Company*, 11 C. B. 140 (E. C. L. R. vol. 78). Cur. adv. vult.

CRESWELL, J., now delivered the judgment of the court.

In this case,—which was argued before the Lord Chief Justice, and my Brother Crowder and myself,—it seems to the court that the question is one of mere special pleading. The declaration alleged that the defendants were common carriers, and received the goods in question *19] to be carried by them *as such common carriers* for hire *and reward. The plea traversed the averment that the defendants received the goods *as common carriers*.

It appeared in evidence that the defendants did not receive any goods to be carried by them, unless the consignor signed a paper containing various conditions subject to which they were to be carried. It was contended that the conditions were unreasonable, and therefore void by operation of the statute 17 & 18 Vict. c. 31, and that the contract must

be treated as unconditional. The learned judge thought the conditions reasonable, that the contract was special, and that the defendants did not receive the goods to be carried by them as common carriers, and directed a nonsuit.

The court is of opinion that he was right. The case of *Latham v. Rutley*, 2 B. & C. 20, 3 D. & R. 211, appears to be directly in point. That was assumpsit against the defendants as common carriers. The declaration stated that the plaintiffs, at the request of the defendants, delivered a parcel to them to be carried from London to Dover, and there delivered, and that the defendants, in consideration thereof, and for hire and reward, undertook to carry safely, but through their negligence the parcel was lost. The jury found that the contract for the carriage of this parcel was subject to the exception of fire and robbery; but that the loss was not within the exception. The plaintiff had a verdict, subject to a motion for a nonsuit. The Solicitor-General, showing cause, contended that the action was founded on the common law liability of carriers, and that the proviso in their favour did not alter the nature of the contract, but, if the loss happened by either of the causes excepted, that was matter of defence; whereupon Holroyd, J.,—an admirable pleader,—observed: “It does not appear that the defendants received the goods upon their common law liability;” and the rule for a nonsuit was made absolute.

*It was argued in the present case, that the case of *Latham v. Rutley*, being in assumpsit, was not an authority. As far as the [*20 question determined at *Nisi Prius* in this case is concerned, it seems to the court to make no difference whether it was in assumpsit or case. But the recent case of *Walker v. The York and North Midland Railway Company*, 2 Ellis & B. 740, was *in case*. The declaration alleged that the goods were delivered by the plaintiff to the defendants as common carriers, and received by them *as common carriers*, to be carried, &c. Pleas,—secondly, a traverse of the averment that the defendants received the goods as common carriers on the terms alleged,—thirdly; setting out a special contract. Lord Campbell, in delivering the judgment of the court, says,—“The declaration alleges that the defendants received the goods as common carriers, with a common-law liability. The second plea says that they did not receive them on those terms; and the third plea, that they received them on certain conditions. Is there not evidence that the defendants had not received them on the terms alleged, which is the second issue? and that there was a special contract, which is the third?” The court cannot distinguish either of those cases from the present, and therefore think that the rule for setting aside the nonsuit must be discharged.

The *York, Newcastle, and Berwick Railway Company, App., Crisp, Resp.*, 14 C. B. 527 (E. C. L. R. vol. 78), is another authority to the same effect.

Rule discharged.

Prideaux, for the plaintiff, asked leave to appeal, under the 17 & 18 Vict. c. 125, s. 85.

*21] WILLIAMS, J.—Neither my Brother Willes nor *myself(a) heard the case argued, and therefore we could not take upon ourselves to give any leave to appeal. Besides, I conceive the case to be an extremely plain one.

WILLES, J.—*Wise v. The Great Western Railway Company*, 1 Hurlst. & N. 68,† and *Pardington v. The South Wales Railway Company*, 1 Hurlst. & N. 392,† are precisely in accordance with the judgment just pronounced. I must confess I thought the point had been settled in all the courts.

Prideaux continuing very perseveringly to urge the hardship of shutting the plaintiff out from contesting the propriety of the judgment, in a court of error, and suggesting that it was not a case in which the other side could be at all prejudiced by the delay,

WILLIAMS, J., said:—Without meaning to intimate the slightest doubt, but merely on the ground that neither of the members of the court now present heard the case argued, we will give the plaintiff time to apply to one of the other judges for leave to appeal. There will be ample time for that; for my Brother Cresswell does not leave town for the circuit until Saturday, and the Lord Chief Justice and my Brother Crowder not until Monday next. All we can do is, to stay the proceedings until Tuesday, to give you an opportunity to make your application to one of those learned judges.

The application was made, but not granted.

(a) The only judges in court.

*22] *HALL v. CONDER and Another. Feb. 20.

By an agreement,—reciting that the plaintiff “*had invented a method for the prevention of boiler explosions, and had obtained a patent for the use of the same within the united kingdom, and was desirous of taking out patents in France, Belgium, and such other places as might be found expedient,*” and further reciting that he had disposed of a moiety of the English patent, and had applied to the defendants to purchase the other moiety, and to assist him in taking out the foreign patents,—it was agreed that the defendants should pay to the plaintiff 2500*l.* in such manner as should be mutually agreed on, and also a proportion of the net profits: and, in consideration of such engagement on the part of the defendants, the plaintiff “*agreed to make over and transfer, and did thereby accordingly make over and transfer to the defendants one half of the said foreign patents when the same should be obtained, and the above-mentioned one half of the English patent thereinbefore referred to.*”

A declaration on the above agreement, averring that the plaintiff was ready and willing to do and did all things necessary on his part to entitle him to the performance of the agreement, and to the payment of the 2500*l.* by the defendants, alleged for breaches,—first, that, although a reasonable time had elapsed, the defendants refused to pay the 2500*l.* or any part thereof,—secondly, that, although a reasonable time had elapsed, the defendants refused to enter into or make any agreement or arrangement with the plaintiff respecting the manner in which the 2500*l.* should be paid,—thirdly, that, although a reasonable time had elapsed, the defendants refused to fix upon or agree with the plaintiff respecting the time or times at which the 2500*l.* or any part thereof should be paid.

The defendants pleaded, to the first breach, that, at the commencement of the action, no agreement had been come to as to the manner in which the 2500*l.* should be paid. They also demurred to the second and third breaches. And, as to all the breaches, they further pleaded, —secondly, that the invention was wholly worthless and of no public utility, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof;—thirdly, that, after the making of the agreement, and before the time for performing it had arrived, and before breach, and before the commencement of the suit, it was agreed that the defendants should pay and the plaintiff receive 200*l.* as the balance then to be paid of the 2500*l.* stipulated for, and that the said sum of 200*l.* should be in full satisfaction of all claims of the plaintiff in respect of the agreement until some profit should have been realized by the defendants from the invention and the letters patent; that, in pursuance of such agreement, the 200*l.* were paid and received by the plaintiff in such full satisfaction as aforesaid; and that no profit had been realized from the invention.

The plaintiff demurred to each of these pleas:—

Held, that the second breach was well assigned; for that the time for payment of the money had arrived; and, if the agreement as to the mode of payment was a condition, the defendants, by refusing to enter into any agreement, had rendered the performance of it impossible, and had either placed the plaintiff in the same position as if there had been no condition, or had become liable to a claim of the same amount, as damages for wrongfully refusing to agree.

Held also, that the second plea was bad; for, that, in the absence of any allegation of fraud, it must be assumed that the plaintiff was an inventor, and there was no warranty, express or implied, either that he was the true and first inventor within the meaning of the statute of James, or that the invention was useful or new; but that the contract was for the sale of the patent such as it was, each party having equal means of ascertaining its value, and each acting on his own judgment.

Held also, that the third plea was bad, being pleaded to all the breaches, and being no traverse of the first.

Whether the first plea afforded any answer to the first breach,—*quære?* for, *semble*, that, if no mode of payment of the 2500*l.* was agreed on, the money would be payable as the law directs where there is no stipulation for agreement.

Leave to add a plea to the second and third breaches (traversing the requests and breaches therein respectively alleged) refused.

The court will not allow execution to issue notwithstanding proceedings in error, under the 150th section of the Common Law Procedure Act, 1852, unless the grounds of error assigned are so frivolous as to be clearly incapable of being sustained on argument.

THIS was an action of debt originally commenced in the Lord Mayor's Court, London, and removed by habeas corpus into this court.

*The first count of the declaration stated, that theretofore, and [*23 before the commencement of this suit, to wit, on the 30th of January, 1856, it was agreed by and between the plaintiff and the defendants in the words and figures following, that is to say, "Upper Charles Street, Westminster. Memorandum of agreement made the 30th day of January, 1856, between W. K. Hall, of the United States of America, of the one part, and Francis Conder & Co., of No. 4 Upper Charles Street, Westminster, engineers and contractors, of the other part: Whereas the said W. K. Hall has invented a method for the prevention of boiler explosions, and has obtained a patent for the use of the same within the United Kingdom, and is desirous of taking out patents in France, Belgium, and such other places as may be found expedient: And whereas the said W. K. Hall has already parted with or assigned away an interest of one-half of the said English patent, and is desirous of disposing of the remaining half, to which he hereby declares that he has full right and title: And whereas the said W. K. Hall has applied to the said Francis Conder & Co. to assist him in

taking out the said foreign patents, and also to purchase his above-stated interest in the said English patent: It is hereby agreed between the said parties that the said Francis Conder & Co. shall forthwith proceed to take out and secure such patents for France, Belgium, and such other places as may be mutually agreed on between the said parties to this agreement, with the exception of the United States of America: And it is further agreed that they shall pay to the said W. K. Hall the

*24] sum of 2500*l.* *in such manner as shall be mutually agreed *on,* and a further sum equal to one-tenth of the net proceeds of one-half the English patent, from and after the time that the said net profits shall amount to the sum of 20,000*l.* on the whole patent: And, in consideration of such engagement on the part of the said Francis Conder & Co., the said W. K. Hall agrees to make over and transfer, and does hereby accordingly make over and transfer to the said Francis Couder & Co. one-half of the said foreign patents when the same shall be obtained, and the above-mentioned one-half of the English patent hereinbefore referred to: And the said W. K. Hall further agrees to execute such further legal documents as may be requisite for the due carrying out of this agreement. In witness whereof the said parties have hereto set their signatures the day hereinbefore named. Francis Conder & Co. W. K. Hall." Averment, that, after the making of the said agreement as aforesaid, the plaintiff was ready and willing to do, and did, all things necessary on his part to entitle him to the performance of the said agreement, and to the payment of the said sum of 2500*l.* by the defendants: Yet the defendants, although a reasonable time had elapsed since the making of the said agreement, had wholly neglected and refused, and still did wholly neglect and refuse, to perform the same, in this, that they the defendants, although a reasonable time had elapsed, and they had been often requested to pay to the plaintiff the said sum of 2500*l.*, had hitherto wholly neglected and refused, and still did wholly neglect and refuse, to pay the same, or any part thereof, to the plaintiff;—and in this, that they the defendants, although a reasonable time had elapsed since the making of the said agreement, and although they had been often requested so to do, had hitherto wholly neglected and refused, and still did wholly neglect and refuse, to enter into or make any agreement or arrangement with the plaintiff

*25] respecting the manner in which *the said sum of 2500*l.* should be paid by them to the plaintiff;—and also in this, that the defendants, although a reasonable time had elapsed since the making of the said agreement, and although often requested so to do, had hitherto wholly neglected and refused, and still did neglect and refuse, to fix upon or agree with the plaintiff respecting the time or times, or respecting any time or times, at which the said sum of 2500*l.*, or any portion or instalment thereof, should be paid by them to the plaintiff, &c.

The declaration also contained counts for work and labour, money paid, &c., interest, and money due upon accounts stated.

First plea, to the first breach, that, at the commencement of this action, no agreement had been come to between the plaintiff and the defendants as to the manner in which the said sum of 2500*l.* should be paid by the defendants to the plaintiff.

The defendants also demurred to the first count so far as the same related to the breaches secondly and thirdly assigned, the ground of demurrer as to each of the said breaches being, "that no cause of action is shown, the so-called breaches not having correlative obligations stated in or to be inferred from the said first count."

Second plea, to all the breaches, that the said invention was wholly worthless, and of no public utility or advantage whatever, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof.

Third plea, to all the breaches, that, after the making of the agreement in the first count mentioned, and before the time for performing the said agreement in any respect had arrived, and before any breach thereof, and before the commencement of this suit, it was mutually agreed by and between the plaintiff and the defendants, that the defendants should pay to the plaintiff *and the plaintiff receive from the defendants, the sum of 200*l.* as the balance then to be paid [*26 by the defendants to the plaintiff of the said sum of 2500*l.* to be paid to the plaintiff according to the said agreement in the said first count mentioned; and that the said sum of 200*l.* should be in full satisfaction of all claims and demands of the plaintiff upon the defendants in respect of the said agreement, until some profit should have been realized to the defendants from the said invention and the said letters patent; that, in pursuance of the said agreement, they paid the plaintiff the said sum of 200*l.*, and the plaintiff received the same, in such full satisfaction as aforesaid; and that, since the said payment to the plaintiff of the said 200*l.*, no profit had been realized on the said invention by the defendants or by any person or persons claiming an interest therein through the defendants.

Fourth plea, as to the residue of the declaration, never indebted.

Fifth plea, as to the residue of the declaration, a set-off for money lent, &c.

Sixth plea, payment before action.

The plaintiff took and joined issue on the first, second, third, fourth, and sixth pleas, and joined in demurrer as to the second and fourth breaches.

He also demurred to the first plea, the ground stated in the margin being "that the defendants' obligation under the contract remained notwithstanding the absence of the said agreement,"—to the second plea, on the ground "that it was not necessary that the patent should

have been good or new, or that the plaintiff was the first inventor, and, if it were, that it did not appear by the second plea but that the defendants knew the contrary when they made the contract declared on,"—and to the third plea, on the ground "that it was without meaning, and set up no valid contract."

*27] *And for a further replication to the third plea, the plaintiff said that he was induced to enter into and make the said agreement in that plea mentioned, through and by means of the fraud, covin, and deceit of the defendants; and for a further replication as to the fifth plea, never indebted.

The defendants joined in demurrer as to the first, second, and third pleas, and took issue on the further replication to the third plea, and joined issue on the replication to the fifth plea.

The demurrer was argued in Hilary Term last.

Byles, Serjt. (with whom was *Lush*), for the plaintiff.—The first breach, which alleges the non-payment of the 2500*l.*, is a good breach. The consideration for the defendants' agreement to pay that sum, is, the assignment of the plaintiff's interest in a patent already obtained in England, and also in patents about to be obtained in France and Belgium. The first question arises upon the meaning of the agreement to pay the plaintiff the 2500*l.* "in such manner as shall be mutually agreed on." The context shows that those words have no reference to time: the word "manner" must, therefore, receive its ordinary construction,—"*form*" or "*mode*;" for instance, in cash, or in notes, or through a banker, or in any way which does not import the giving of time. It may, indeed, be doubtful whether it amounts to anything more than is ordinarily implied in every agreement for the payment of money,—to pay upon request: and, if so, the bringing of the action is a sufficient request. But, assuming that the words in question mean that something is to be agreed upon between the parties before the money is to be paid,—that they are to agree, not merely as to the *mode*, but also as to the *time* of payment,—the declaration contains a general averment of performance of all conditions precedent on the *28] part of *the plaintiff to entitle him to the payment of the money: the money, therefore, being due, in the absence of any agreement as to the time and mode of payment, such payment must be made as the law directs where there is no stipulation. The first plea, which addresses itself to that breach, is, that, at the commencement of this action, no agreement had been come to between the plaintiff and the defendants as to the manner in which the 2500*l.* should be paid. This plea, it may be conceded, cuts from under the plaintiff the averment that all things were done that were necessary to entitle him to have the agreement performed by the defendants: but the allegation of readiness and willingness remains; and that is enough to sustain the breach: notes to *Peters v. Opie*, 2 Wms. Saund. 352, citing *Lancashire*

v. Killingworth, Com. Rep. 117, 12 Mod. 580, 1 Lord Raym. 686, *Rawson v. Johnson*, 1 East, 208, *Bordenave v. Gregory*, 5 East, 107, and *Laird v. Pim*, 7 M. & W. 474.† The second and third breaches, which allege a refusal on the part of the defendants to agree as to the manner or the time of payment of the money, are clearly unexceptionable breaches. The second plea, which is addressed to all the breaches, amounts to this,—“Your patent, which you have agreed to assign to us, is liable to be defeated by plea, or by scire facias, by reason of want of public utility or novelty.” Be it so, still the plaintiff has that which he professes to sell. [COCKBURN, C. J.—The agreement commences with a recital that the plaintiff “*has invented* a method for the prevention of boiler explosions, and has obtained a patent for the use of the same.” If he is not the first inventor, the patent is of no avail. Are the defendants to pay this large sum, when they find the patent void? It may be that they may have a remedy against the plaintiff, should it so turn out: but non constat that the invalidity of the contract would be discovered or set up. [COCKBURN, C. J.—Are the *defendants bound to take the chance of that?] The law will not regard the [*29 value of the consideration for the defendants’ promise, however worthless or inadequate it may appear to be: *Haigh v. Brooks*, 10 Ad. & E. 809, 823 (E. C. L. R. vol. 37), 2 P. & D. 477, 3 P. & D. 452. That was an action upon a promise made by the defendant in consideration of the plaintiff’s giving up a guarantee which turned out to be worthless: and, in giving judgment, Lord Denman (10 Ad. & E. 820) says,—“We are by no means prepared to say that any circumstances short of the imputation of fraud in fact could entitle us to hold that a party was not bound by a promise made upon *any consideration* which could be valuable; while of its being so the promise by which it was obtained from the holder of it must always afford some proof. Here, whether or not the guarantee could have been available within the doctrine of *Wain v. Warlters*, 5 East, 10, the plaintiffs were induced by the defendant’s promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge.” That principle is strictly applicable here. [WILLIAMS, J.—The case seems rather to fall within that class of cases in which it has been held that there is no implied warranty of title or quality, on the sale of an ascertained chattel.] Assuming the absence of fraud, the maxim “*Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis*,” applies. Or, the case may be assim-

*30] lated to that of a man selling *a lease after a forfeiture has been incurred: if the party takes the benefit of the contract, he is not to be absolved from paying the price, because it turns out, without any fraud on the part of the seller, that the thing is of less value than was anticipated. In *Kintrea v. Perston*, 1 Hurlst. & N. 357,† 25 Law J. Ex. 287, it was held that a contract for the sale of an agreement for a lease does not imply an undertaking that the proposed lessor has title to grant the lease; and, in the absence of any express stipulation, it is no defence to an action upon such contract that the lessor has no title. Assuming that the objection to the patent is tenable, there is a chance that the defect will not be discovered. [CRESWELL, J.—That would be tantamount to making the defendants pay the plaintiff a large sum for the chance of successfully defrauding the public. The suggestion is, that the plaintiff deceived the crown by alleging that he was the first inventor: and the invalidity of the patent may be shown under the plea of non concessit.] So far, at all events, as concerns foreign countries, the invention may be new. [COCKBURN, C. J.—The whole rests upon the fact of the plaintiff being the true and first inventor: the agreement starts with that recital.] The surrender of a doubtful right is a good consideration for a promise to pay a stipulated sum: *Longridge v. Dorville*, 5 B. & Ald. 117 (E. C. L. R. vol. 7). A defeasible contract may still be of some value. [WILLIAMS, J., referred to *Gompertz v. Bartlett*, 2 Ellis & B. 849 (E. C. L. R. vol. 75). There, an unstamped bill of exchange, endorsed in blank, purporting to be a foreign bill, was sold, without recourse, by the holder, who was not a party to the bill. It proved to have been drawn in this country, and was therefore unavailable for want of a stamp, and could not be enforced against the parties. The vendor and purchaser, at the time of the sale, were both alike ignorant of this defect. It was held that the purchaser was entitled to recover back the price from the vendor,

*31] on the ground *that the article sold as a foreign bill did not answer the description by which it was sold: though it would have been otherwise (the sale being without any warranty, and there being no fraud) had the latent defect been one consistent with the article being a foreign bill. Lord Campbell, in giving judgment, there says: “The law is, I think, accurately laid down in the passage cited from Addison on Contracts (2d edit. p. 152). If, being what was sold, the bill was valueless because of the insolvency of the parties, the vendor would not be answerable: but he is answerable, if the bill be spurious. *Jones v. Ryde*, 5 Taunt. 488, and *Young v. Cole*, 3 N. C. 724, 4 Scott, 489, are strongly in point. *Young v. Cole* is indeed a very strong case; for, the things sold there as Guatemala bonds were in one sense of the words Guatemala bonds; but they were not what was professed to be sold, viz. bonds binding on the Guatemala government. The case is precisely as if a bar was sold as gold, but was in fact brass, the vendor

being innocent. In such a case, the purchaser may recover." In the cases put of the lease or the agreement for a lease, there is not, as in the case put by Lord Campbell, a total failure of consideration. [CRESSWELL, J.—In *Haigh v. Brooks*, the defendant had the very thing he contracted for, both parties knowing what it was that they were bargaining about.] So, in the case of the bezar stone,—*Chandler v. Lopus*, Cro. Jac. 4, and in the case of the gold bar, the purchaser got the thing he bargained for. [WILLIAMS, J.—But in those cases, as in *Gompertz v. Bartlett*, the thing did not answer the description by which it was sold.] Here, the article contracted for is identified: it is a patent which the plaintiff had obtained for "a method for the prevention of boiler explosions." So long as that patent is a subsisting patent, the defendants are liable on their agreement; though, should it be avoided for want of novelty, or as not being the proper subject of a patent, *they may have a remedy by cross-action, or may claim to reduce the damages. The third plea is clearly bad. *Cumber v. Wane*, 1 Stra. 426, and the authorities cited in the notes to that case in 1 Smith's Leading Cases, 246 et seq., show that payment of a smaller sum cannot be pleaded in satisfaction of a larger liquidated debt. It is true the plea states that the smaller sum was agreed to be paid before breach. But there is no chasm between the making of the contract and the breach of it, in which there could be a rescission of the contract. [CRESSWELL, J.—The language of the plea would seem to imply that 2300*l.* of the stipulated sum had already been paid.] Exactly so.

Field, contrà.—It was a condition precedent that the manner,—that is, the time as well as the mode,—of payment of the 2500*l.* should be mutually agreed upon. There is no cause of action as alleged in the first breach, until such agreement was come to. [COCKBURN, C. J.—When were the parties to agree as to the time and mode of payment? If that be left uncertain, the law infers that the payment shall be made in a reasonable time.] The uncertainty vitiates the whole contract: *Cope v. Albinson*, 8 Exch. 185.† In *Milnes v. Gery*, 14 Ves. 490, an agreement was entered into for the sale of premises according to the valuation of two persons, one chosen by each party, or of an umpire to be appointed by those two in case of disagreement; and a bill for a specific performance, praying that the court would appoint a person to make the valuation, or otherwise ascertain it, was dismissed,—Sir W. Grant, M. R., saying, "The more I have considered this case, the more I am satisfied, that, independently of all other objections, there is no such agreement between the parties as can be carried into execution. The only agreement into which the defendant entered, was, to purchase at a price to be *ascertained in a specified mode. No price having ever been fixed in that mode, the parties have not agreed upon any price. Where, then, is the complete and concluded contract which this court is called upon to execute? The price is of

the essence of a contract of sale. In this instance the parties have agreed upon a particular mode of ascertaining the price. The agreement that the price shall be fixed in one specific manner certainly does not afford an inference that it is wholly indifferent in what manner it is to be fixed." An instance of this kind of uncertainty in a contract, is found in the case of *Taylor v. Brewer*, 1 M. & Selw. 290, where, a person having performed work for a committee under a resolution entered into by them "that any service to be rendered by him should be taken into consideration, and such remuneration be made as should be deemed right;" and it was held that an action would not lie to recover a recompense for such work, the resolution importing that the committee were to judge whether any remuneration was due. The second plea is clearly a good answer to the declaration. The contract is executory. It purports to pass to the defendants a legal right (as to a moiety) to the alleged invention for the time the patent has to run. It must be assumed that the parties intended the one to sell and the others to buy something of value. In *Purvis v. Rayer*, 9 Price, 488, 518, Lord Chief Baron Richards says: "It is a general rule in equity, founded on principles of honesty and the dictates of good sense, that, if a person, generally speaking, offers anything for sale, the vendee, or he who becomes the purchaser, is entitled to see that the vendor has it with the qualifications and in the way in which he, the vendee, understood that he bought it; that is, so as to afford him an assurance of having bought what he wanted, and meant to buy, or at least what was offered or professed to be sold,—or he may reject the contract."

*34] [CRESSWELL, *J.—Those observations, apart from the facts with reference to which they are made, are not very intelligible.] The point decided in the case, was, that, if a contract be made for the sale of *leasehold property* unconditionally and without a stipulation in terms on the part of the vendor that he means to sell *his interest* only in the residue of the term, and that he will not warrant his lessor's title,—he is bound to show to the satisfaction of the purchaser that his lessor, or the original grantor of the term, was entitled to grant the lease. He cannot otherwise oblige the purchaser to complete the contract made for the purchase of the premises. [CRESSWELL, J.—*Spratt v. Jeffery*, 10 B. & C. 249 (E. C. L. R. vol. 21), 5 M. & R. 188, seems to be an authority against you. There, by contract, A. agreed to sell to B. the two leases and goodwill in trade of a public-house, and shop adjoining, for 4250*l.*, "as he holds the same," for twenty-eight years from Midsummer next ensuing, at the annual rent therein mentioned, and B. agreed to accept a proper assignment of the said leases and premises as above described, without requiring the lessor's title; and, upon payment of the said sum of 4250*l.*, A. agreed to execute an effectual assignment of the said leases, and deliver up possession of all the said premises: and it was held that the true meaning of this agree-

ment was, that the vendee was to purchase the two leases without *inquiring into* the title of the lessor, and could not refuse to complete his purchase on account of an objection to that title.] *Purvis v. Rayer* is confirmed by *Souter v. Drake*, 5 B. & Ad. 992 (E. C. L. R. vol. 27), where it is distinctly laid down, that, in every contract for the sale of an existing lease, there is an implied undertaking by the seller (if the contrary be not expressed) to make out the lessor's title to demise; and that, without showing such title, the seller cannot maintain an action at law against the buyer for refusing to complete the purchase. The terms of the instrument in *Spratt v. Jeffery* showed that both parties *intended to waive the question of title. Here, if the defendants had paid the money, they would have been entitled to recover it back: *Cripps v. Reade*, 6 T. R. 606. [CRESWELL, J.—In that case the defendant had not that which he professed to sell; and the purchaser was evicted. Here, however, the plaintiff had the patent.] True; but it was worthless. In *Morley v. Attenborough*, 3 Exch. 500, 509,† *Parke, B.*, says,—“With respect to *executory* contracts of purchase and sale, where the subject is unascertained, and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred, in the same manner as it would be implied, under similar circumstances, that a merchantable article was to be supplied. Unless goods which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery, and if he did, and the goods were recovered from him, he would not be bound to pay, or, having paid, he would be entitled to recover back the price, as on a consideration which had failed.” Here, the object of the contract was, the purchase of the invention. That has not been attained. The case differs, therefore, from *Haigh v. Brooks*, where the defendant got all he bargained for, and all that the plaintiff professed to sell. So in *Kintrea v. Perston*, all that the plaintiff intended to sell, was, the agreement. In *Hastie v. Couturier*, 9 Exch. 102,† the plaintiffs, merchants at Smyrna, chartered a vessel to proceed to Salonica, and there having loaded a cargo of Indian corn to proceed to a safe port in the united kingdom. The plaintiffs accordingly shipped at Salonica 1180 quarters of Indian corn; and, on the 22d of February, 1848, the master signed a bill of lading making the corn deliverable “to order of the plaintiffs, or to their assigns, he or they paying freight as per *charter-party.” The plaintiffs endorsed the bill of lading, and sent it together with the charter-party to B., their London agent, with orders to sell the cargo on their account; and they also, through B., insured the cargo “at and from Salonica to the port of discharge in the united kingdom,” &c., “corn warranted free from average, unless general, or the ship be stranded.” On the 1st of May, 1848, B.

employed the defendants, corn-factors in London, to sell the cargo, and sent them the bill of lading endorsed, the charter-party, and policy of insurance, and they advanced 600*l.* on the cargo. The custom of corn-factors is, to sell under a del credere commission, and when so selling not to mention the purchaser. On the 15th of May, 1848, the defendants sold the cargo to C., and sent him a bought-note, which stated that he had bought of them “1180 quarters of Salonica Indian corn of fair average quality when shipped, at 27*s.* per quarter, free on board, and including freight and insurance to a safe port in the united kingdom: payment at two months from this date, upon handing over shipping documents.” On the same day, the defendants wrote to B. advising him of the sale, but without making any mention of the purchaser, or of commission. The vessel sailed from Salonica on the 23d of February, and, having met with tempestuous weather, the cargo became so heated and fermented that the vessel was obliged to put into Tunis Bay, where the cargo, having been surveyed, was found to be unfit to be carried further, and, on the 24th of April, it was sold. On the 23d of May, C. gave the defendants notice that he repudiated the contract, on the ground that the cargo did not exist at the time of the sale to him. In March, 1849, C. became bankrupt. The plaintiffs brought an action against the defendants to recover the price of the cargo, and declared specially on a del credere guarantee: and it was held in the Exchequer Chamber,—reversing the judgment of the Court of Exchequer,—that *37] the *contract was for the sale of a cargo supposed to exist and capable of transfer to the purchaser, and that, inasmuch as it had been sold to other persons prior to the time of the contract, the plaintiffs could not recover. And that decision was affirmed by the House of Lords: see *Couturier v. Hastie*, 5 House of Lords Cases, 673. [COCKBURN, C. J.—That case would be more to the purpose if this patent had been repealed before the making of the contract.] *Strickland v. Turner*, 7 Exch. 208,† is also a strong authority in favour of the defendants. There E. H. L., who resided at Sydney, New South Wales, being entitled to an annuity for his life, assigned it, in 1847, to certain trustees, to dispose of it for his benefit. The plaintiff entered a correspondence by letter with the trustees, upon the subject of the purchase, and, from the various letters which passed between the parties, it appeared that the terms of the purchase were not finally determined upon and settled until the 28th of February, 1849. Upon the 6th of that month the annuitant died. The purchase-money was paid by the plaintiff in ignorance of the fact, and was ultimately received by the executrix of the deceased: it was held, that, as at the time of the purchase of the annuity it had ceased to exist, the plaintiff was entitled to recover back the whole of the purchase-money from the executrix, on the ground that the money had been paid without consideration. The third plea affords a good answer to the plaintiff's claim. [WIL-

LIAMS, J.—It is pleaded to all the breaches. How do you apply it to the first breach?] It is an informal traverse of that breach. At all events, it shows a new substituted contract before breach. It was perfectly competent to the parties to make a new agreement: *Taylor v. Hilary*, 1 C. M. & R. 741.† [WILLIAMS, J.—The plea seems to me to be perfectly unintelligible. How can the 200*l.* be “the balance then payable” of the 2500*l.*?]

Lush, in reply.—The cases cited on the first point, have no application. *Cope v. Albinson*, 8 Exch. 185,† was the case of a [*38 mere proposal, which never ripened into a contract, and therefore no action would lie. *Milnes v. Gery*, 14 Ves. 400, was a contract for sale at a price to be fixed in a given manner: the price, which was the essence of the contract, was never ascertained. Besides, it by no means follows that an action may not be maintained upon an agreement, although a court of equity will not decree specific performance, because the price is not ascertained. *Taylor v. Brewer*, 1 M. & Selw. 290, has no analogy whatever to this case. Every debt is payable at the time and in the manner the parties mutually agree upon. The meaning of the contract here evidently is, that the 2500*l.* is payable presently, in cash, unless the parties shall otherwise agree. Assuming that the money was not payable at the plaintiff's option, the second breach, which charges a refusal to enter into an agreement respecting the manner in which the payment was to be made, clearly is a good breach: it throws the refusal to agree entirely upon the defendant. [COCKBURN, C. J.—Suppose the parties met, and could not agree upon the manner of payment, what is to happen?] That difficulty affords a strong argument to show that the parties could not have intended the *agreement* to be a condition precedent. Everything is fixed but the time of payment. Suppose one of the parties died or became insane immediately after the execution of the agreement, would the defendants get the benefit of the patent without paying the money? The last breach, at all events, stands clear of the objection suggested by the Lord Chief Justice. As to the second plea, it is said that the agreement is all executory. As regards the English patent, however, it amounts to an absolute assignment in equity; and, as to the foreign patents, it amounts to an agreement to assign them when taken out: and, consistently with *that plea, the defendants may have had the full benefit of the [*39 English patent. It may be that the invention is, as the defendants allege, wholly worthless, and yet the defendants may have acquired large profits from the working of it. There is no allegation of fraud. The recital that the plaintiff had invented a method for the prevention of boiler explosions, and had obtained a patent for the use of the same within the united kingdom, is the language of both parties to the agreement: *Bowman v. Taylor*, 2 Ad. & E. 278 (E. C. L. R. vol. 29); 4 Nev. & M. 264. With respect to the last plea, it is difficult to

imagine what it means. It is addressed to all the breaches; and as to the first breach, it is clearly bad, and consequently it is bad altogether. [GROSSWELL, J.—The third plea is manifestly a bad one.]

COCKBURN, C. J.—There was a case partly heard a few days ago, one of the points in which has some bearing on this case. It may, therefore, be desirable to hear that case out before we dispose of this. (a)

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court.

The first question arising on this record, is, whether the plea to the first breach is good, viz. that, when the action was commenced, no agreement had been made as to the manner in which the 2500*l.* should be paid. The question stands thus:—2500*l.* was to be paid on an event that has happened (viz. the sale of a moiety of the patent) in such manner as might be agreed on. The money was due: if any particular mode of payment was agreed on, payment in that mode would fulfil the contract; but, if no mode was agreed on, there is much *40] *ground for contending that the money then due must be paid as the law directs where there is no stipulation for agreement. This question, however, only involves a small amount of costs; for, we are of opinion that the second breach is good. It alleges that the defendants, although a reasonable time has elapsed, have wholly refused to enter into any agreement respecting the manner in which the money was to be paid. The time for payment of the money had arrived. If the agreement as to the mode of payment is a condition, the defendants, by refusing to enter into any agreement, have rendered the performance of it impossible, and have either placed the plaintiff in the same position as if there had been no condition, or have become liable to a claim of the same amount, as damages for wrongfully refusing to agree.

The question raised by the demurrer to the second plea,—which is pleaded to all the breaches, viz. that the alleged invention was wholly worthless and of no public utility, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof,—is not free from difficulty.

With regard to the sale of ascertained chattels, it has been held that there is not any implied warranty of either title or quality, unless there are some circumstances beyond the mere fact of a sale, from which it may be implied. The law on this subject was fully explained by Parke, B., in giving the judgment of the Court of Exchequer in *Morley v. Attenborough*, 3 Exch. 500,† which, as far as title is concerned, he thus sums up,—“From the authorities in our law, to which may be added the opinion of the late Lord Chief Justice Tindal in *Ormot v. Huth*, 14 M. & W. 651,† it would seem that there is no implied warranty of title on the sale of goods; and that, if there be no fraud, a vendor is not liable for a bad title, unless there is an express warranty or an

(a) The case alluded to was *Smith v. Neale*, post, p. 67.

equivalent to it by declarations or conduct: and the *question in each case, where there is no warranty in express terms, will be, [*41 whether there are such circumstances as to be equivalent to such a warranty." And the law is quite as firmly established, that, on the sale of a known ascertained article there is no implied warranty of its quality; *Chanter v. Hopkins*, 4 M. & W. 399.† But there is another class of cases in which it has been held that a party is not bound to accept and pay for chattels, unless they are really such as the vendor professed to sell, and the vendee intended to buy: of which *Young v. Cole*, 3 N. C. 724, 4 Scott, 489, and *Gompertz v. Bartlett*, 2 Ellis & B. 849 (E. C. L. R. vol. 75), are strong authorities. In the latter case, Lord Campbell says it is precisely as if a bar was sold *as gold*, but was in fact *brass*, the vendor being innocent. In this case, the thing sold was ascertained, viz. a moiety of a patent granted by her Majesty: there was no express warranty; and, whether it be said that the question raised on this plea impeaches the plaintiff's title to the thing sold, or its quality, no warranty can be implied. But, did the plaintiff profess to sell and the defendant to buy a good and indefeasible patent right? or, was the contract merely to place the defendant in the same situation as the plaintiff was in with reference to the alleged patent?—in which case, his position would be similar to that of the plaintiff in *Kintrea v. Perston*, 1 Hurlst. & Norm. 357.† The plaintiff professed to have *invented* a method for the prevention of boiler explosions. It is not alleged that he was guilty of any fraud. He must, therefore, have been an inventor; for, if he was not, he must have known it, and would have been guilty of fraud in pretending to have invented. Whether he was the true and first inventor within the meaning of the statute of James, is another question. The first material allegation in the plea is, that the alleged invention was wholly worthless, and of no utility to the public. Now, that was a matter as much within the *knowledge of the defend- [*42 ants as of the plaintiff. The next allegation, viz. that it was not new as to the public use thereof in England, and that the plaintiff was not the first and true inventor, was also a matter as much within the knowledge of the defendants as of the plaintiff. They had the same means of inquiring into the fact, and of learning whether it had been in use, or the invention had been previously made known in England. Why, therefore, should we assume that the plaintiff meant to assert that the patent was indefeasible, and that the defendants purchased on that understanding, rather than that, each knowing what the invention was, and having equal means of ascertaining its value, they contracted for the patent such as it was, each acting on his own judgment? We think that the latter was the true nature of the contract, and that there was no warranty express or implied, and that the case does not fall within *Young v. Cole* or *Gompertz v. Bartlett*, which proceeded on the somewhat nice distinction before pointed out; nor is it within the prin-

ciple upon which the case of *Chanter v. Leese*, 4 M. & W. 295,† and 5 M. & W. 698,† was decided; for, there the plaintiff contracted that the defendants should have the *exclusive right* to sell certain things for which patents had been obtained: there was no doubt as to what the parties contracted for; and as the plaintiff, if one of the patents was invalid, could not confer the privilege which he agreed to confer, and for which the defendant contracted to pay, the consideration for the defendants' promise failed, and (to use the language of Lord Abinger), the whole resting in contract, and nothing having been done under it, the contract was at an end. Here, the plaintiff was capable of fulfilling all that he contracted to do; he had already done it in equity. The defendants might have had all that they contracted to receive, and were therefore bound to pay.

*43] *On these grounds, we hold that the plea gives no answer to the declaration. The last plea was disposed of during the argument. It is pleaded to all the breaches. As to the first, it cannot be treated as a traverse of the breach, and, the breach being admitted, it gives no answer.

Judgment accordingly.

Field, who had unsuccessfully applied for leave to amend at the time judgment was given, on the 17th of April moved for leave to add a plea to the second and third breaches, traversing the requests and breaches therein respectively alleged.(a) [CROWDER, J.—Having taken your chance upon the issues in law, you now wish to raise issues of fact. Have you any authority for that?] It is submitted that it is warranted by the 222d section of the 15 & 16 Vict. c. 76, which enacts that “it shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at Nisi Prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be *so made.” There are issues *44] of fact now upon the record which must be tried. [CRESSWELL, J.—In effect you want to deny the contract declared on.] Not so. [CRESSWELL, J.—The plaintiff declares on an absolute agreement to pay him 2500*l.* in a manner to be agreed on. You want to set up a conditional purchase. That is a denial of the contract stated in the declaration.]

(a) A previous application for the same purpose had been made to Coleridge, J., at Chambers, and referred by him to Cresswell, J., before whom the parties attended at Kingston on the 20th of March, when the learned judge refused to make any order, saying that the defendants might apply to the Court.

The written contract cannot be varied or controlled by the facts sought to be pleaded. That which the defendants are desirous of putting in issue, is, something which has happened since the making of the contract,—the agreement subsequently come to. [COCKBURN, C. J.—If there are any circumstances to show that justice requires that you should be allowed to put a new defence upon the record, we ought at least to have them on affidavit.]

Affidavits were afterwards (on the 22d) produced, and a rule nisi granted. These affidavits stated, in substance, that, on the day on which the agreement was signed, viz. on the 30th of January, 1856, the plaintiff called at the defendants' office, and stated that he was in want of an immediate advance of money, and proposed to sell them the moiety of his invention for 2500*l.*; that the deponent (one of the defendants) told him, that, as it was quite uncertain whether the invention would turn out well or not, they were not willing to pay so large a sum otherwise than out of the profits, but that they had no objection to the plaintiff being the first person remunerated out of the profits (which all parties then believed were likely to be realized), or to advance a small sum to meet the plaintiff's present necessities; that the plaintiff assented to this, and it was then agreed that 2500*l.* should be the price, but that a small part only, the amount of which was not then fixed, should be paid in cash, and the balance should be paid out of the proceeds of the invention, less the costs of working the same; and the memorandum declared upon *was prepared upon the spot, with [45 the intention of expressing such agreement; that on the 9th of February, the plaintiff called again on the defendants, and they then advanced him 20*l.* on account of the sum which it had been so agreed should be paid in cash; and on the 19th he again applied for a further sum, and the defendants expressed their willingness to pay him the further sum of 200*l.* down as the balance of the sum which they had agreed to pay in that manner, but they declined to pay any more of the 2500*l.* until profits had been realized to that extent; and the plaintiff then expressly assented, and the defendants thereupon paid him 200*l.* in cash, and he then wrote out and signed a receipt, as follows:—“London, February 19th, 1856. Received of Francis Conder & Co. the sum of 200*l.* as the balance of the sum agreed to be paid by them to me for the transfer of my patent for the prevention of explosions in steam-boilers, previous to the realization of any profit on the same. W. K. Hall:” that it was at such last-mentioned interview also agreed that the foreign patents should be immediately completed, and they were so completed by the defendants; and, in the month of July following, the plaintiff applied to the defendants for an advance of money to enable him to go to Paris with the view of selling the French patents, and they thereupon advanced him 25*l.* for that purpose, and he thereupon signed a receipt, as follows: “London, July 2d, 1856. Received

of Messrs. Conder & Co. the sum of 25*l.* for expenses attending sale of foreign patents. W. K. Hall:" and that neither at such time, or at any other time than the said 19th of February, 1856, did the plaintiff ever apply to the defendants for any payment on account of the 2500*l.*, nor did he at any time, except as above stated, ever request the defendants, or either of them, to make any agreement or arrangement respecting the manner or times of payment of the 2500*l.*, nor had the *46] defendants, or either of them, ever refused to make such agreement or arrangement, but, on the contrary, they did, on the said 19th of February, make and enter into such agreement and arrangement as aforesaid for the purpose of carrying out the first agreement so made between the plaintiff and the defendants as aforesaid.

Lush, on a subsequent day (May 5th), showed cause, principally upon an affidavit of the plaintiff, alleging that the 2500*l.* was agreed to be paid to him by the defendants, without any regard to the profits of the invention, and that the receipt for the 200*l.* was prepared by the defendants, and his signature thereto obtained by fraud and coercion. The learned counsel submitted that the application was unconscientious and merely for the purpose of delay, that the proposed defence was manifestly in contradiction to the written agreement, and that, if the defendants had originally pleaded as now proposed, the judgment would probably have been for the plaintiff in a particular in which it now (somewhat erroneously) stood entered for the defendants, viz. as to the demurrer to the first plea. [CRESSWELL, J.—The court intended to give judgment for the defendants on that issue. The rule was advisedly and carefully and accurately drawn in the form in which it appears. Although the argument for the plaintiff on that issue was plausible, the court gave judgment against it. COCKBURN, C. J.—There being issues of fact to be tried, the plaintiff cannot be prejudiced by allowing the proposed traverses. If there is a defence, the defendants ought not in consequence of a mere slip of the pleader to be shut out from it.]

Field, in support of the rule.—The case is clearly within the 222d section of the Common Law Procedure Act, 1852: and there can be *47] no just reason why the defendants should be deprived of the privilege of trying the case before a jury on its merits. It is contended on the other side that the second breach is good, as showing a refusal by the defendants to come to some arrangement as to the mode of payment. The agreement of the 19th of February is in truth the very agreement which the original agreement of the 30th of January contemplated.

Cur. adv. vult.

WILLES, J.—In this case a rule was obtained by Mr. *Field* calling upon the plaintiff to show cause why the defendants should not have leave to add a plea to the second and third breaches, traversing the requests and breaches therein respectively alleged. Against this rule cause was shown on a former day in this term, when the court took

time to look into the affidavits. At the request of the Lord Chief Justice and my learned Brothers, I have done so; and I now proceed to give our judgment.

The action is brought for the breach of an agreement to pay 2500*l.* for the purchase of a moiety of a certain patent. By that agreement it was stipulated that the defendants should pay the plaintiff the 2500*l.* "in such manner as should be mutually agreed on:" and, after the usual averments, the declaration sets out three breaches,—first, that, although a reasonable time had elapsed, and the defendants had been requested, they refused to pay the 2500*l.* or any part thereof,—secondly, that, although a reasonable time had elapsed, and the defendants had been requested, they refused *to enter into or make any agreement or arrangement with the plaintiff respecting the manner in which the 2500*l.* should be paid*,—thirdly, that, although a reasonable time had elapsed, and the defendants had been requested, they refused to fix upon or agree with the plaintiff respecting the time or times at which the 2500*l.*, or any portion or instalment thereof, should be paid. To that *declaration the defendants pleaded several pleas, the one mainly [*48 relied on being, "that the said invention was wholly worthless and of no public utility or advantage whatever; and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof." Upon the validity of that plea there was an argument, which resulted in a judgment for the plaintiff. The pleas were dated the 27th of November, 1856: and it appears from the affidavits filed in answer to this rule, that repeated applications had been made as well by the plaintiff as by his attorney for payment of the money; and that the defendants did not on those occasions object that no mode of payment had been mutually agreed on, but insisted that the plaintiff was not entitled to recover at all. It seems, then, that the defendants would not at that time have agreed on any mode of payment: and it is clear that the plea which is now sought to be added is an after-thought. Still, if it were a plea which could in any manner avail the defendants, and the plaintiff could sustain no detriment by its being put upon the record, it ought to be now allowed. Upon consideration, we think that on neither ground ought the proposed plea to be allowed. If it had been pleaded in November last, the plaintiff might have discontinued, and might have called upon the defendants then to agree as to the manner of payment, and might have brought a fresh action and gone to trial at once. It is plain, therefore, that the plea is in the nature of a dilatory plea, and puts the plaintiff in a worse position than he would have been in. Then, would it be any advantage to the defendants to have this plea upon the record? Clearly not. They state in their affidavit that they never agreed to pay the 2500*l.* absolutely and at all events, but only out of the net profits to be derived from the patent. That is not consistent with the terms of the written agreement. If,

therefore, they were allowed to add the plea, they could not raise upon
 *49] it the point of *law, they propose to rely upon. We therefore think
 the rule should be discharged, and that the plaintiff's costs should
 be costs in the cause. Rule discharged accordingly.

The issues of fact came on for trial at the sittings at Westminster after Easter Term, when a general verdict was found for the plaintiff.

The defendants having brought a writ of error herein,—the grounds of error stated in the memorandum filed with the masters pursuant to the 149th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, being, “that the declaration discloses no undertaking on the defendants’ part either express or to be inferred, to make any agreement or arrangement as to the manner or as to the time of payment of the said sum of 2500*l.*; and also that it is not alleged that the agreement or arrangement which they were requested to make was a reasonable one either as respects the manner or as respects the time of payment,”—

Lush, on the 27th of May, obtained a rule calling upon the defendants to show cause why the plaintiff should not be at liberty to issue execution, notwithstanding the proceedings in error, the errors assigned being frivolous. He referred to the 150th section, which provides, that, “if the grounds of error shall appear to be frivolous, the court or a judge upon summons may order execution to issue.” [COCKBURN, C. J.—I think we can hardly say that the grounds of error assigned are frivolous, where the case has been fully argued, and the court below has taken time to consider its judgment. WILLES, J.—The material
 *50] question which was before the court upon the demurrers, *viz. that arising upon the alleged invalidity of the patent, is finally disposed of by the verdict.]

Knowles, Q. C., and *Field*, on the 3d of June, showed cause.—The right to bring a writ of error is one which the courts have always been very slow to interfere with. The agreement here declared upon is a very peculiar one. And, after the court has thought fit to take time to consider its judgment, it can hardly be said that the matter is so plain and clear that so large a sum as 2500*l.* should be handed over to a foreigner, without giving the defendants an opportunity of taking the opinion of a court of error. In *Gardner v. Williams*, 3 Dowl. P. C. 796, Parke, B., upon an occasion similar to this, observes,—“How can we say that an objection is frivolous upon which the court granted a rule nisi? A party is entitled to a writ of error ex debito justitiæ; and, unless the causes of error are clearly frivolous, we cannot interfere.” There, after a verdict for the plaintiff in an action for slander, the defendant obtained a rule nisi for arresting the judgment on two grounds, but the court afterwards discharged the rule without hearing the counsel

against it. The defendant then brought a writ of error, suggesting the same grounds: and it was held that these grounds could not be considered as frivolous within the meaning of the rule of Hilary Term, 4 W. 4, r. 9,—which was in terms the same as the 150th section of the Common Law Procedure Act, 1852. [CRESSWELL, J.—I must protest against that case being considered as an authority.] The plaintiff will sustain no prejudice, the error day being so near at hand,—June the 18th. [*Lush* observed that it would be too late to set the case down for argument for that day. WILLES, J.—That is a mistake. Under the Common Law Procedure Act, 1852, s. 155, and the 68th rule of Hilary Term, 1853, the case may *be set down four days before [*51 the actual day of argument: this was so decided in the Exchequer Chamber in *Parr v. Jewell*, 16 C. B. 684, 700 (E. C. L. R. vol. 81). (a)] The defendants are willing to afford every facility in expediting the argument. [COCKBURN, C. J.—The bona fides of the defendants may be very properly tested by their bringing the money into court.] They have already given bail which are perfectly unexceptionable.

Lush, in support of the rule.—The state of the record is very different now from what it was when the demurrers were before the court. There was then a plea upon the record, that the alleged invention was worthless and not new, and that the plaintiff was not the true and first inventor. That plea is now virtually off the record, no evidence having been offered at the trial in support of it. There was also a plea alleging, that, before the time for performing the agreement, and before breach, an agreement was come to between the parties, under which the plaintiff received 200*l.* in full satisfaction of all claims and demands of the plaintiff upon the defendants in respect of the said agreement, until some profit should have been realized to the defendants from the invention. That was found to be untrue in point of fact. The attention of the court upon the argument was mainly addressed to the second plea. When the statute provides, that, if the grounds of error shall appear to be frivolous, the court or a judge upon summons may order execution to issue, the intention evidently was, that the court or judge should exercise some judgment on the matter. If the errors assigned are manifestly not arguable, they are within the meaning of the statute frivolous. No argument has been or could be suggested upon either of the grounds assigned here. [COCKBURN, C. J.—I think it is *hardly justifiable to argue the case over again before us.] If the [*52 defendants were not bound to enter into an agreement to pay the money, they were bound absolutely to pay it without agreement.

COCKBURN, C. J.—I am of opinion that this rule must be discharged, not on the ground of any doubt I entertain as to the propriety of the judgment pronounced by the court on the former occasion, but on the

ground that it is the undoubted right of the suitors of this court against whom judgment has been given, to take the opinion of a court of error. Such being the undoubted right of the suitor, I think we ought to be extremely cautious in interfering with it. And, unless we see that a writ of error has been brought upon grounds which are clearly frivolous, and altogether incapable of being sustained upon argument, we are bound not to exercise the power which the statute gives us. In the present case, although I entertain no doubt as to the correctness of the judgment which is called in question, still I cannot say that the matter is not open to argument: and, as it is stated on affidavit that the writ of error is brought, not for the purpose of delay, but *bonâ fide* and under the advice of counsel, it is not a case for the exercise of our discretion.

CRESSWELL, J.—The plaintiffs in error must undertake to argue the case, if possible, on the error day after this term.

The rest of the court concurring,

Rule discharged,—“the defendants (the plaintiffs in error) by their counsel hereby undertaking to do all in their power to expedite the argument of the errors assigned between the said parties.”

*53] *The case came on for argument in the Exchequer Chamber on the 18th of June, before Lord Campbell, C. J., Lord Chief Baron Pollock, Coleridge, J., Erle, J., Crompton, J., and Bramwell, B.

Whateley, Q. C. (with whom was *Field*), for the plaintiffs in error.—The declaration discloses no undertaking on the part of the defendants to enter into any agreement as to the manner or the time of payment of the 2500*l.*, or to pay that sum at all events. The true effect of that stipulation in the contract, is, that the defendants will pay the 2500*l.* in the event of a subsequent agreement being come to for its payment and for the time and manner of paying it. [Lord CAMPBELL, C. J.—Is it not an agreement that they will agree as to the manner of payment?] Not absolutely. Until the mutual agreement is come to, nothing is payable. [Lord CAMPBELL, C. J.—One of the breaches assigned, is, the refusal to enter into an agreement. The plaintiff would be entitled to recover so much as the jury may think he ought to receive by reason of the second agreement not having been made.] Suppose the parties had met for the purpose of endeavouring to come to some arrangement as to the manner and time of payment, but were unable to agree, by reason of the one requiring present payment and the other a postponed payment, what is to happen? [Lord CAMPBELL, C. J.—In that case there would be a breach of the agreement. POLLOCK, C. B.—Suppose this had been the case of the sale of goods to be delivered immediately, with a stipulation for payment in a manner

to be agreed upon on a future day, and the purchaser refused to come to any agreement,—when would the money be payable?] In a reasonable time probably. [CROMPTON, J.—In the case put by the Lord Chief Baron, the contract is broken by the refusal to agree as to the mode of payment, and the money becomes payable immediately.] *Then, there is a plea that the patent was void. [Lord CAMPBELL, C. J.—We had that matter discussed recently in the Court [*54 of Queen's Bench, where we held such a plea bad, the defendant having had what he contracted for: *Gompertz v. Bartlett*, 2 Ellis & B. 849 (E. C. L. R. vol. 75). COLERIDGE, J., referred to *Chanter v. Leese*, 4 M. & W. 295,† 5 M. & W. 698.†] The plaintiff professes to sell a valid patent. [Lord CAMPBELL, C. J.—No. There is no warranty. If you could have shown fraud, that would have been another matter. BRAMWELL, B.—Suppose the defendants had worked the patent for fourteen years, and then discovered it to be invalid, setting aside the difficulty as to the statute of frauds, could they recover back the money they had paid for it?] No: that would be unreasonable. [Lord CAMPBELL, C. J.—To make anything of this point, there must have been either a warranty or fraud. No fraud is alleged; and there is no warranty as to the quality of the thing contracted for.] Supposing the money to have been paid, and the invention to turn out not to be new, the money would be recoverable back as upon a failure of consideration. [Lord CAMPBELL, C. J.—Not in the absence of a warranty.] A man is not bound to accept and pay for chattels which are not what the seller professed to sell and the buyer intended to buy: *Young v. Cole*, 3 N. C. 724, 4 Scott, 489. [Lord CAMPBELL, C. J.—There the plaintiff professed to sell Guatemala bonds, whereas what he delivered were not genuine Guatemala bonds. That was like the case of the forged bill,(a) or the scarlet cuttings.(b)] The party there did not get the thing he contracted for. So, here, a patent is not a patent at all unless it confers an exclusive privilege; which a void patent cannot do. [Lord CAMPBELL, C. J.—The thing contracted for here was a real patent *under the Great Seal, although, by reason of circumstances not within the knowledge of either party at the time of the contract, [*55 it might ultimately prove valueless.] If the court are prepared to hold, that, under this contract, the defendants were bound to accept a patent for an invention which was wholly worthless and not new, there is an end of the argument. [ERLE, J.—Many a patent for an old and worthless invention (so to speak) has been upheld by the aid of a skilful advocate.]

Montague Smith, Q. C., *contra*, was not called upon.

Lord CAMPBELL, C. J.—Mr. *Whateley* has urged all that could be

(a) *Jones v. Ryde*, 5 Taunt. 488, 1 Marsh. 157.

(b) *Bridge v. Wain*, 1 Stark. N. P. C. 504.

urged upon both points. We are all of opinion that the judgment of the Court of Common Pleas was right, and should be affirmed.

Judgment affirmed.(a)

(a) The defendants afterwards brought a writ of error returnable in parliament: and, upon application to a judge at Chambers, an order was made for payment into court of the amount of the damages and costs, and for its payment out to the plaintiff upon his giving security to the satisfaction of the master for the restitution of the money in the event of the judgment being reversed by the House of Lords.

Upon sale of a chattel a warranty of 9 Barbour Sup. Ct. 619; Presbury v. title is implied: Dorsey v. Jackman, Morris, 18 Missouri, 165. 1 Serg. & R. 42; Defreeze v. Trumper, Though the general rule is that the 1 Johns. 174; Heerman v. Vernoy, 6 vendor of a chattel impliedly warrants the title, yet when the chattel is not in Johns. 5; Reed v. Barber, 3 Cowen, the vendor's possession this rule does 272; Ricks v. Dillahunt, 8 Porter, 183; not prevail. In such case the party Chancellor v. Wiggins, 4 B. Monroe, 201; Trigg v. Faris, 5 Humph. 344; Charl- buys at his peril, unless there be an ton v. Lay, Ibid. 496; Gookin v. Gra- express warranty: Edick v. Crim, 10 ham, Ibid. 480; Dresser v. Ainsworth, Barbour Sup. Ct. 445; Lackey v. Stou- der, 2 Carter, 373.

*56]

*HORLER v. CARPENTER. Feb. 10.

The declaration stated that the defendant, as executor of one J., was accustomed and liable to pay over under her will to one A. certain rents and moneys received by him under the will to the use of A., and that, in consideration that the plaintiff would advance moneys to A., the defendant promised to repay her any such sums as she might so advance, from and out of the first money which he (the defendant) should receive on account of A., to wit, out of the first moneys to be by him thereafter received on account of the aforesaid rents and moneys, as and when he should receive the same: Averment, that plaintiff afterwards advanced to A. moneys in the whole amounting to 58*l.* 8*s.*, and A. thereupon gave her an authority to receive the amount from the defendant; that the defendant afterwards received 20*l.* on account of the said rents and moneys, and paid the same to the plaintiff, but afterwards, and before he received any more, purchased A.'s interest in the said rents and moneys, and took an assignment thereof, and thereby disabled himself from performing his contract with the plaintiff, and had ever since received the rents and moneys in his own right.

Plea, that, at the time of the purchase of A.'s interest, the defendant had no notice or knowledge that the plaintiff had advanced A. more than the 20*l.* so paid by him to the plaintiff, or that A. had given the plaintiff an authority to receive any further sum:—

Held, that the plea was a sufficient answer to the declaration; for, that the defendant's promise did not attach until the authority was given, and A., by parting with his interest, deprived himself of the power to give such authority.

THE first count of the declaration stated that the defendant, before and at the time of the making of the promise thereafter in that count mentioned, was the executor of the last will and testament of one Mrs. Jenkins, deceased, and, as such executor, under and by virtue of the provisions of the said will, had been and was accustomed and liable to pay over to one Thomas Adams certain rents and moneys received and to be received by the defendant under the said will for the use and

behoof of the said Thomas Adams; and thereupon, in consideration that the plaintiff would lend and advance to the said Thomas Adams moneys of her the plaintiff, he the defendant promised the plaintiff, upon the said Thomas Adams giving the plaintiff an authority to receive the amount from the defendant, to repay to the plaintiff any such sums as she the plaintiff might so lend and advance, from and out of *the first money* which he the defendant should receive *on account of the said* Thomas Adams, to wit, from and out of the first moneys to be by him thereafter received on account of the aforesaid *rents and moneys, [*57 as and when he should receive the same, and to hold himself responsible to the plaintiff for the same: Averment, that the plaintiff, confiding in the said promise and undertaking of the defendant, did afterwards lend and advance to the said Thomas Adams divers large sums of money, in the whole amounting, to wit, to 58*l.* 8*s.*; and the said Thomas Adams did thereupon give to the plaintiff an authority to receive the said amount from the defendant, who then had due notice of the premises: and the defendant afterwards received, on account of the said rents and moneys, 20*l.*, and paid the same to the plaintiff; but afterwards, and before he received any further portion of the said rents and moneys, the defendant purchased of the said Thomas Adams all his interest of and in the said rents and moneys, and took an assignment of the same from the said Thomas Adams, and thereby disabled himself from performing his said contract with the plaintiff according to the said terms thereof, and had ever since received as they became due the said rents and moneys in his own right, and the plaintiff had never yet been paid the residue of the said sum of 58*l.* 8*s.*, or any part thereof, out of the said rents and moneys, or otherwise.

Fourth plea,—that, at the time of the said alleged purchase by and conveyance to him of the said interest of the said Thomas Adams of and in the said rents and moneys, he had not due notice and did not know that the plaintiff had advanced to the said Thomas Adams any further or other sum than the said sum of 20*l.* so paid by the defendant to the plaintiff as aforesaid, or that the said Thomas Adams had given to the plaintiff an authority to receive any such further or other sum; and that the said Thomas Adams had not *then* given to the plaintiff any such authority.

The plaintiff demurred to the fourth plea,—one ground of demurrer stated in the margin being, “that, as the *defendant’s contract [*58 was absolute, he was not discharged or excused on account of want of notice by or to him of the facts mentioned in the plea.”

The defendant joined in demurrer; and the case was argued in Hilary Term last, before Cockburn, C. J., Cresswell, J., and Williams, J.

Holl, in support of the demurrer.(a)—The proper construction of the

(a) The points marked for argument on the part of the plaintiff, were,—

* First, that, as the first count of the declaration discloses an absolute contract on the defend-

contract declared on, is, not that the defendant contracted to repay the advances out of money received *on account of Adams*,—these being mere words of description: but it imports an absolute undertaking to repay the advances out of moneys to be received for rents under the will. The defendant, by purchasing Adams's interest, has put it out of his power to perform his contract. [CRESSWELL, J.—The declaration charges that the defendant promised to repay to the plaintiff the advances made by her to Adams, out of moneys to be received by him on account of Adams, that money was advanced upon the faith of that *59] promise, and that the *defendant repaid the plaintiff 20*l.*, but afterwards, and before he received any further portion of the rents and moneys, by purchasing Adams's interest therein, disabled himself from performing his contract with the plaintiff. To this the defendant pleads, that, at the time of the purchase, he had no notice or knowledge that the plaintiff had advanced Adams more than 20*l.*, or that Adams had given her an authority to receive more. If the defendant had had such notice, in all probability he would not have purchased on the same terms. The equity of the case is against the plaintiff, whatever the strict law may be. COCKBURN, C. J.—Does the defendant by having purchased Adams's interest, cease to receive the moneys “on account of Adams?” Even if the contract means that the advances are to be repaid out of moneys to be received “on account of Adams,” the effect would be, that, upon an authority being given by Adams, there was an equitable assignment of his interest, and a contract at law to carry out that equitable assignment. In the notes in 2 White & Tudor's Leading Cases, 575 (to Row v. Dawson, 1 Ves. sen. 331, and Ryall v. Rolls, 1 Ves. sen. 348), it is said: “In equity, an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much money. Nor is it necessary, as it would appear by some of the decisions at law, that the party receiving the order should, in some way, enter into a contract: Burn v. Carvalho, 4 Mylne & Cr. 702, 703.” In M'Gowan v. Smith, 26 Law Journ. Ch. 8, A. owed B. money upon a contract: the money was payable by instalments: B. gave an order upon A. for payment of a portion of such money to C.: A., at the request in writing of B., made two payments under the order to C., but refused to be personally bound by the terms of it: B. became insolvent, *60] and some money was still due to C. *under the order: C. filed a bill against A. and the assignees of B. for an account and pay-

ant's part to repay the plaintiff's advances to Thomas Adams, out of moneys to be received by him on account of Thomas Adams, the defendant was not entitled to notice of such advances, or discharged or excused from payment for want of such notice:

“Secondly, that the defendant could and might and ought to have ascertained for himself whether the authority in the fourth plea mentioned was or was not given:

“Thirdly, that it was consistent with the plea demurred to that an authority might have been given to the plaintiff to receive the whole amount advanced by him from the defendant in general terms, and that a fresh authority was not necessary in respect of each instalment of the advances.”

ment: and it was held that the order operated as an equitable assignment, and that C. was entitled to an account of the money then due under it, without regard to any payments made by A. [WILLIAMS, J.—You need not have recourse to the doctrine of equitable assignment here; for, there is a statement of consideration,—that the advances were made at the request of the defendant.] The defendant cannot be permitted by his own act to put it out of his power to perform his contract. [COCKBURN, C. J.—His obligation remains as if he were still the recipient of the money on account of Adams. He still receives the money under the will; and Adams is still entitled, except in so far as he has parted with his rights to the defendant.] When the defendant purchased Adams's interest, he ceased to receive the moneys payable under the will on Adams's account, and received them in his own right. The declaration does not state how much he has received; but so much as he has received he was bound to pay over to the plaintiff. Suppose the purchaser of Adams's interest had been a third person; the defendant, though he would still receive the rents under the will, would receive them on account of the purchaser, and not on account of Adams. [CRESWELL, J.—A creditor proves a debt in bankruptcy, and assigns his interest in the dividends: the assignees would pay the dividends on account of the creditor; and the recipient would receive them on account of the creditor.] Not in equity, after notice of the assignment. [CRESWELL, J.—We are here dealing with legal rights.] Assuming that the defendant did receive the money on account of Adams, the declaration sufficiently alleges that he so received it. Whatever construction, therefore, the court puts upon the contract, the declaration is good. Then as to the plea. [WILLIAMS, J.—How do you get over the averment in the plea that *Adams did not give the plaintiff an authority to receive [*61 money beyond the 20l. ?] The contract is an absolute one, to repay the money advanced on Adams giving an authority; and by his own act the defendant has incapacitated himself from performing it. The defendant could not either at law or in equity discharge himself from that obligation: *Calvert v. Gordon*, 7 B. & C. 809 (E. C. L. R. vol. 14), 1 M. & R. 497; *Gordon v. Calvert*, 4 Russ. 581, 1 Sim. 258. In *Ford v. Tiley*, 6 B. & C. 325 (E. C. L. R. vol. 18), by agreement, A. stipulated that he would, as soon as he should become possessed of a certain public-house, execute a lease thereof to B. from the 21st of December, 1855, for fourteen or twenty-one years. At the time of making the agreement, the house was upon lease, which would not expire till Midsummer, 1827; the legal estate being in trustees, first, to pay debts, and then to pay an annuity, and subject thereto, to the use of A. if he attained twenty-four. In June, 1825, after A. had attained twenty-four, but before the outstanding lease had expired, he and the trustees had joined in a lease to C. for twenty-three years. It was held that A. having thereby put it out of his power, so long as the latter

lease of 1825 subsisted, to grant any lease to B., had committed a breach of his agreement, and was liable to an action for such breach, although the first lease had not expired. So, in *Lovelock v. Franklyn*, 8 Q. B. 371 (E. C. L. R. vol. 55), the plaintiff declared upon a contract by the defendant, then holding land for a term of years, to assign all his interest to the plaintiff, on payment by the plaintiff, within seven years from a day named, of 140*l.*, assigning for breach, that, before the seven years had expired, the defendant assigned all his interest to a stranger: and it was held, on special demurrer, that the breach as laid was a good ground of action, the defendant having incapacitated himself from performing the contract, if called on. [WILLIAMS, J.—Upon looking more closely at the plea, I find it is not a traverse of the allegation in *62] the declaration: it merely states that Adams *had not *then*,—that is, at the time of the purchase of his interest,(a)—given the plaintiff an authority to receive the money. COCKBURN, C. J.—The plaintiff must show that the contract into which the defendant entered, was one of indefinite duration,—an undertaking on his part to repay advances, whenever made, on her obtaining an authority from Adams.] It is submitted that the defendant has bound himself to repay any advances out of each money he should first receive after the authority given. It is like a continuing guarantee for advances to be made. [WILLIAMS, J.—The defendant pleads that he had no notice of any further advance. What right would he have to withhold the money from Adams, if there had been no assignment?] Having undertaken to repay the plaintiff's advances, he was bound to ascertain whether or not any authority had been given. The effect of the contract was, to preclude Adams, in equity, from dealing with his interest without giving notice to the plaintiff of his intention so to do. The plea, therefore, clearly is no answer to the declaration.

Prideaux (with whom was *Byles*, Serjt.), *contra*.(b)—It cannot be permitted to the plaintiff, when one construction of his declaration fails him, to turn round and rely upon a totally different one,—especially *63] since duplicity is no longer a ground of demurrer. The contract *declared upon, was to repay, not all moneys that might be advanced, but all such moneys as the defendant might receive on account of Adams, and be authorized by him to pay over to the plaintiff. There is nothing upon the face of the declaration to show that the two events upon which the defendant's liability to pay over the money depends have happened. The promise, it is submitted, was conditional upon the

(a) *Cresswell*, J., so states, p. 59.

(b) The points marked for argument on the part of the defendant, were,—

"First, that the plea is good;—secondly, that the declaration is bad;—thirdly, that the plaintiff has no cause of action against the defendant by reason of the purchase by the defendant of the interest of Adams, or otherwise, under the circumstances in the declaration mentioned; and that the declaration does not disclose any breach of contract or other cause of action against the defendant."

Quære, what information these points give as to the matters intended to be argued?

defendant's receiving the rents *on account of Adams*, and receiving an authority from him to pay them over. The case in principle very much resembles that of *Beswick v. Swindells*, 3 Ad. & E. 868 (E. C. L. R. vol. 30), 5 N. & M. 378. There, by the condition of a bond for payment of 400*l.*, it was recited that the obligor was about to marry E. E., linen-draper, and thereby to become possessed of a stock in trade, now hers, and that in consideration thereof it was agreed that he should execute a bond to the obligee to pay the children of E. E. by her late husband 300*l.* within twelve months next after E. E.'s death, in the event thereafter specified: and the condition therefore was, that, if S. (the obligor) shall within twelve months next after the decease of E. E., pay to her child or children, &c., 300*l.*, "if upon an account of the stock in trade and effects in the linen-drapery business, if then carried on by the said S.," the same "shall amount to the sum of 400*l.*, but, in case, upon such account to be taken as aforesaid, the said stock in trade and effects shall amount to less than that sum, then, if the said S." shall pay to the child or children, &c., 120*l.* within twelve months next after the decease of E. E., the said obligation shall be void, &c. Plea, that E. E. died, and that, before her death, and ever since, S. had ceased to carry on the business, and that he had not at or since the time of her death any stock in trade, &c. Replication, that, at the end of twelve months from E. E.'s decease, there were, and still are, children of E. E. by her late husband living: It was held, on demurrer, that, as *the [*64 recited agreement was, to pay in the event after specified, and the condition was, to pay 300*l.* or 120*l.* according to an account to be taken of the business, *if then carried on*, the obligor might discharge himself by pleading that he had discontinued the business. If the argument on the other side be tenable, the defendant would equally have been liable to repay the moneys advanced by the plaintiff, if the assignment of Adams's interest under the will had been made to a third person. *Ford v. Tiley* and *Lovelock v. Franklyn* have no application: the contracts there were unconditional, in the one case to grant a lease, in the other to assign; and the defendant was to be liable to a penalty if he did anything to disable himself from performing his engagement. Besides, there fraud was suggested. Then, whatever the construction of the declaration, the fourth plea is a good answer to it. The promise is, to pay a certain amount upon receiving an authority so to do. The record shows that the money was advanced, the authority given, and the amount paid. It clearly could not be a continuing authority. The declaration speaks of one amount and one authority; and the plea shows that that authority has been given and acted upon; and the plea alleges that the defendant had no notice that more was due.

Holl, in reply.—The contract clearly contemplates the payment of more than one sum; when it speaks of money to be received under the will, it uses the singular number; when of payments to be made, the

plural. The defendant was to pay upon the authority being obtained, not upon his having notice of it. [WILLIAMS, J.—You cannot treat it as an original assignment of the fund by Adams. If you could, your argument would be very much fortified. COCKBURN, C. J.—The defendant in effect says, “As to the first transaction, I acted upon the *65] authority. You make a second advance, and give me no *notice of your having done so: and I, in ignorance of that state of things, purchase Adams’s interest.”] Having entered into this engagement, it was incumbent on the defendant, before he did anything to prevent him from carrying out the contract, to inquire whether or not further moneys had been advanced. *Beswick v. Swindella*, 3 Ad. & E. 868 (E. C. L. B. vol. 30), 5 N. & M. 378, is clearly distinguishable. The engagement to pay the 300*l.* or the 120*l.* was conditional upon the trade being carried at the wife’s death. On the other hand, *Ford v. Tiley* and *Lovelace v. Franklyn* are distinct authorities to show, that, assuming this to be in the nature of a continuing guarantee, there was an implied contract on the part of the defendant not to do anything to prevent himself from performing it.

COCKBURN, C. J.—(addressing *Holl*.)—How do you propose that we should deal with the declaration? If you do not mean to stand upon the fact of the defendant’s having incapacitated himself from performing his contract, the declaration is in so uncertain a shape that the defendant ought not to be called upon to answer it.

Holl asked time to consider whether or not he would apply for leave to amend; but, on a subsequent day (January 23d), he intimated that he would stand by his declaration. Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court.

In this case,—which was argued before the Lord Chief Justice, my Brother Cresswell, and myself, the court is of opinion that the defendant is entitled to judgment.

The declaration is, in substance, that the defendant, as executor of Mrs. Jenkins, was liable to pay over to one T. Adams certain rents *66] received and to be received *by the defendant under the will of Jenkins to the use of T. Adams, and that, in consideration that the plaintiff would lend money to Adams, he, the defendant, promised that, on Adams giving authority to the plaintiff to receive it, he would pay to her the money advanced to Adams, out of the first moneys received on his account; that the plaintiff lent Adams 58*l.* 8*s.*; that Adams gave the plaintiff an authority to receive it from the defendant, who had due notice; that the defendant afterwards received 20*l.* on account of Adams, and paid it over to the plaintiff, but, before he received any more, bought Adams’s interest, and so disabled himself from performing his contract, and afterwards received the rents on his own account, and never paid the plaintiff the residue of the 58*l.* 8*s.*

The promise to pay to the plaintiff the money advanced by her to

Adams was, therefore, subject to two conditions,—first, that the defendant should receive money on Adams's account,—secondly, that Adams should give an authority for the defendant to pay it to her.

Then, the plea states, that, before the defendant purchased, he had no notice or knowledge that the plaintiff had advanced more than 20*l.*; and that Adams had not then given the plaintiff an authority to receive more than that sum.

The plaintiff's counsel contended that the defendant was liable, because he had disabled himself from fulfilling his contract. But that seems to be founded on a fallacy. This contract was not, to repay all that should at any time be advanced; but, *all that the defendant should receive and be authorized to pay over*: and that he fulfilled. As he had not notice of any further advance, he cannot be said to have purchased in fraud of his contract. He had fulfilled the only contract that had then attached; and Adams, by giving a further authority after he had parted with his interest, acted in fraud of *his* contract to sell. [*67 The defendant's promise did not attach until the authority was given; and Adams, by selling, deprived himself of the power to give such authority. If the plaintiff was defrauded, it was by Adams, and not by the defendant.

We are, therefore, of opinion that the plea is a sufficient answer to the declaration, and that our judgment must be for the defendant.

Judgment for the defendant.

SMITH v. NEALE. Feb. 20.

A written proposal, containing the terms of a proposed contract, signed by the defendant, and assented to by the plaintiff by word of mouth, is a sufficient agreement within the 4th section of the statute of frauds.

An agreement whereby all that is to be done by the plaintiff constituting one entire consideration for the defendant's promise, is capable of being performed within a year, and no part of what the plaintiff is to do constituting such consideration is intended to be postponed until after the expiration of the year, is not within the 4th section of the statute of frauds, notwithstanding the performance on the part of the defendant is or may be extended beyond that period.

In an action for the breach of an agreement to make the necessary periodical payments for stamp-duty to keep alive a patent which had been assigned to the defendant:—Held, that "non concessit," in the absence of any fraud, or of any warranty that the alleged invention was new or was a manufacture within the statute of James, puts in issue merely the fact of Her Majesty having granted the patent, and not its validity.

THIS was an action for an alleged breach of contract.

The declaration stated that the plaintiff was the first and true inventor of a certain new manufacture, that is to say, certain "improvements in the manufacture of toys, models, and other like articles of ornament or utility;" and thereupon, theretofore, to wit, on the 5th of March, 1858, Her Majesty, Queen Victoria, by letters patent under the great seal, and dated the day and year last aforesaid, granted the plaintiff the sole

privilege to make, use, exercise, and vend the said invention within the united kingdom of Great Britain and Ireland, the Channel Islands, *68] and the Isle of Man, for the term of *fourteen years from the said 5th day of March, 1853, subject, amongst the other usual conditions, to the condition that the same should be void, and the powers and privileges thereby granted should cease and determine, at the expiration of three years and seven years respectively from the date thereof, unless there should be paid before the expiration of the said three years and seven years respectively the stamp-duties in the schedule to the statute in such case made annexed expressed to be payable before the expiration of the third year and the seventh year respectively, and such letters patent, or a duplicate thereof, should be stamped with proper stamps showing the payment of such respective stamp-duties, and should when stamped be produced, before the expiration of such three years and seven years respectively, at the office of the commissioners of patents for inventions: That afterwards, and before the expiration of three years from the date of the said letters patent, to wit, on the 21st of June, 1855 (the stamp-duty payable before the expiration of the said three years not having been paid), it was agreed by and between the plaintiff and the defendant, that the said letters patent should be conveyed to the defendant and any friend of the plaintiff, in trust for a society (in which the defendant was interested) called "The Ladies' Guild," subject to the following conditions,—that the plaintiff should receive 5 per cent. on the selling price of all articles sold, in which her patent was employed, payable quarterly; that the defendant should provide for the next payment on the said patent, that is to say, for the said stamp-duty payable before the expiration of the said three years from the date of the said patent; that, if the payments made to the plaintiff were not equal to 50*l.* in the first year, and 75*l.* in every subsequent year, the plaintiff should have the right, on giving one month's notice, and repaying any payments made to keep up the *69] patent, to reclaim it, unless the *deficiency in the year was made up within the month; and that, in the event of the Guild not being carried on, the patent should revert to the plaintiff, subject to the repayment of moneys paid to keep it up: That afterwards, and before the time for preparing the said conveyance had elapsed, the plaintiff and defendant agreed that the said conveyance should be made to the defendant and Henry Dirks upon the said trusts, and that such conveyance should be prepared by the defendant: That all conditions necessary, matters, and things on the plaintiff's part to entitle her to sue the defendant in respect of the breaches thereafter mentioned, were performed and happened; yet, by the default of the defendant, no such conveyance was prepared or executed, nor were the said letters patent conveyed to the defendant and the said Henry Dirks or any other person according to the said agreement, or otherwise; and the defendant

neglected and refused to prepare any such conveyance, and exonerated and prevented the plaintiff from executing the same, although a reasonable time in that behalf had elapsed before the suit; nor did the defendant provide for the next payment on the said patent, but neglected and refused to do so, although the time for providing for and making such payment had elapsed before the suit; whereby the powers and privileges granted by the said letters patent ceased and determined at the expiration of three years from the date thereof, and the plaintiff was deprived of divers profits which she might and otherwise would have made, had the said letters patent continued in force, she having up to the expiration of the said three years fulfilled all other conditions in the said letters patent up to that time to be fulfilled: And the plaintiff claimed 600*l*.

The defendant pleaded,—first, that he did not agree as in the declaration was mentioned.

Secondly, that after the making of the said *first-mentioned agreement, and before any breach thereof, in the year 1855, the [*70 said agreement in the declaration first mentioned was rescinded and abandoned by the mutual consent of the plaintiff and the defendant, and the plaintiff then absolved and exonerated the defendant from his said promises, and the performance of the same.

Thirdly, as to so much of the declaration as related to the first-mentioned agreement, and the breaches thereof, that the agreement and promise in the declaration first mentioned was made subject to the condition mutually agreed upon between the said parties, that the said agreement should determine, and that the said letters patent should revert to the plaintiff, and that the plaintiff should forthwith, on demand, pay to the defendant all moneys which might have been at any time paid by the defendant for the purpose of keeping up the patent, in the event of the said society called “The Ladies’ Guild” not being carried on; that, before the said next payment on the said letters patent had become due and payable, that is to say, before the expiration of three years from the date of the said letters patent, and before any breach of the first-mentioned agreement by the defendant, it had become impossible to carry on the said society called “The Ladies’ Guild,” and the said society called “The Ladies’ Guild” had ceased to be carried on within the meaning of the said agreement,—of all which the plaintiff before the expiration of the said period of three years from the date of the said letters patent had notice.

Fourthly, as to so much of the declaration as related to the said first-mentioned agreement, and the breaches thereof, that the plaintiff was not the first and true inventor of the said manufacture as in the said declaration is mentioned; by reason whereof the said letters patent in the declaration mentioned were at the time of the making of the said alleged agreement null and void.

*71] *Fifthly, as to so much of the declaration as related to the said first-mentioned agreement, and the breaches thereof, that Her said Majesty did not by her said supposed letters patent in the declaration mentioned, grant to the plaintiff the sole privilege to make, use, exercise, and vend the said invention within the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man, as in the declaration was alleged.

Sixthly, as to so much of the declaration as related to the first-mentioned agreement, and the breaches thereof, that the plaintiff had not fulfilled all the conditions in the said letters patent until the expiration thereof as in the declaration mentioned, in this, that the said letters patent were made by Her said Majesty subject to a condition that the plaintiff by an instrument in writing under her hand and seal should particularly describe and ascertain the nature of the said invention and in what manner the same was to be performed, and cause the same to be filed in the great seal patent office within six calendar months next and immediately after the date of the said letters patent; and that the plaintiff did not within six calendar months next and immediately after the date of the said letters patent in the declaration mentioned cause any instrument in writing under the hand and seal of the plaintiff particularly describing and ascertaining the nature of the said invention and in what manner the same was to be performed, to be filed in the said great seal patent office; whereby and by reason whereof the said letters patent, and all liberties and advantages whatsoever thereby granted, had utterly ceased, determined, and become void before the making of the said agreement in the declaration first-mentioned.

The plaintiff joined issue upon each of these pleas.

The cause was tried before Willes, J., at the sittings in London after last Trinity Term. The facts which appeared in evidence were as follows:—The defendant, a *gentleman of fortune, who from bene-
*72] volent motives took an active part in the management of a charitable institution called "The Ladies' Guild," the object of which was the employment of females in suitable works, entered into a negotiation with the plaintiff, who had in 1853 obtained a patent for "improvements in the manufacture of toys, models, and other like articles of ornament or utility," for the use of her patent in promoting the objects of the institution; and, on the 21st of June, 1855, in answer to a proposal on her part to sell him the patent, he wrote to the plaintiff, as follows:—

"I regret that the pecuniary position in which I find myself must prevent my accepting the proposals contained in your letter, though probably not more than you might fairly expect to obtain as the purchase of your patent. The fact is, that I have spent so large a sum,—upwards of 5000*l.*,—in the effort (hitherto unsuccessful) to make the Guild a self-supporting institution, and have lost so much money in

other efforts of a somewhat similar nature, in which I embarked, I fear, with more zeal than prudence, that I am obliged at present to exercise great caution in the conduct of the business, lest I should lose, for want of funds, the chances of success, still uncertain, which appear at length to be opening before me. One of these chances consists in the sale of toys, &c., manufactured under your patent: and I venture under the circumstances to appeal to the interest you have always exhibited in the application of your invention for the promotion of industrial education, as a motive which may induce you to entertain, for the sake of helping to support an institution by which these purposes may be carried out, proposals which you might not be disposed to entertain if they were made by persons who had their own interest only in view. These proposals are as follows:—First, that the patent should be conveyed to myself and any friend of yours, in trust for The Ladies' *Guild, [73 subject to the following conditions,—Secondly, that you shall receive 5 per cent. on the selling price of all articles sold, in which your patent is employed, payable quarterly,—Thirdly, *that I should provide for the next payment on the patent*,—Fourthly, that, if the payments made to you are not equal to 50*l.* in the first year, and 75*l.* in any subsequent year, you shall have the right, on giving one month's notice, and repaying any payments made to keep up the patent, to reclaim it, unless the deficiency on the year is made up within the month,—Fifthly, that, in the event of the Guild not being carried on, the patent should revert to you, subject to the repayment of moneys paid to keep it up.

"Any assistance which you may kindly give in the way of making models, &c., for perfecting or extending the business, will, I am sure, be always much prized by us. And, from the progress which has been made under your friendly supervision, I hope that the manufacture may be continued in a satisfactory manner, without those demands on your time which it has hitherto required, and for giving which you must allow me to offer my sincere thanks.

"E. V. NEALE."

In consequence of this letter, a meeting between the parties took place, when the plaintiff orally accepted the defendant's proposal, and it was arranged that the defendant should prepare a draft deed for assigning the patent. A draft in an unfinished state was afterwards submitted to the plaintiff, but it never was completed. The Ladies' Guild, however, were allowed to have the possession and use of the patent until long after the time when the next payment (50*l.*) for keeping up the patent ought to have been made; but the payment not having been made, the patent became void. There was conflicting evidence as to the novelty of the invention,—the plaintiff's witnesses swearing that such a *combination of materials had never been [74 used before; and a witness who was called on the part of the

defendant as positively swearing that it had been in use long before the date of the patent, and producing specimens of articles made by himself.

The specification, which was filed on the 5th of September, 1853, described the plaintiff's alleged invention as follows:—

“My said invention consists of improvements in the application of well-known materials in a peculiar manner, enabling me to produce toys, and other like articles, which are pretty accurate models of whatever they are constructed to represent, accompanied with the appearance of lightness, while at the same time possessing much strength and durability; whereas, most of the articles known as toys, and particularly such as are intended to illustrate models of household furniture and utensils, being formed principally, if not altogether, of wood, plaster, tin, lead, and similar materials, affording objects of an exceedingly rude as well as mostly of a very fragile character.

“For the better understanding of my said improvements, I will now proceed to describe one method of fabricating model articles of furniture, whether to be used for toys, models, or ornamental purposes, as the same process will apply alike to all, in regard to the main principle I have in view, and which I claim as my invention.

“In forming models, or other like articles, such as tables, chairs, couches, and similar framed work, it is requisite to employ the wire known as bonnet-wire, covered with fine thread, silk, or other suitable material; and, for the broad surfaces of such articles, thin wood or tin-foil may be used, but I prefer employing pasteboard, which must be cut to the desired form of all flat or nearly flat surfaces, as, the
*75] table-tops, and seats and *backs of couches and chairs. The thread-covered wire, or other wire, is then to be divided into suitable lengths for sets of legs, frames, or the like.

“I recommend using bonnet-wire, to facilitate the attachment of wire to wire, or of wire to the pasteboard, wood, tin-foil, or other materials employed, as this is readily effected by stitching them with a needle and thread, passing the needle through the binding on the wire wherever it requires to be attached by stitching another part thereto. When the skeleton of a toy, model, or ornamental article is thus formed, the flat surfaces, if made of card-board, may be coated with tin-foil, oiled or varnished, which prepares it for the next operation, which might otherwise change its form or figure. It is next requisite to give the wire framing suitable substance, communicating to it also any fluted, figured, or other appearance that may be requisite: this is effected by covering the wire, and likewise the card or pasteboard, where necessary, with a composition of whitening mixed with glue or size, such as is ordinarily used by carvers and gilders, or any similar compound will answer the same purpose, so that the wire is embedded in the material, thereby serving to strengthen it, however light in appearance; and, at the

same time, its plasticity favours any ornamental embossing of the surface, and which may be further heightened in effect by painting, varnishing, gilding, or bronzing. When the objects so prepared require the addition of imitative upholstery, the same may be completed in the usual manner, with remnants of the silk and other articles employed.

"I would here observe that the composition may be used strong and plastic for covering wire and other framework, but it may be reduced with warm water, and brushed over flat surfaces requiring only a thin coating. Other compositions, principally formed from *gutta percha or papier maché variously combined, might be employed. [*76 I do not, however, restrict myself to any particular composition, so long as it is one that will spread over the wire, receive an ornamental surface, and in its application bear out the principle of my invention: neither do I confine myself to any particular mode of attaching the wires, for which fine wire may sometimes be used; nor to the kind of wire, as to the metal, size, or covering of the same; nor to any particular class of the articles described, except that I do not claim any of the applications of wire covered with gilders' composition employed for picture, mirror, and like works of furniture, for which the same has hitherto been in use. And I do declare that what I claim as my invention is, namely,—

"The employing of wire, with or without pasteboard or thin wood, covered with any thickening adhesive composition, when wire forms the skeleton or principal framework of toys, models, and other like articles of ornament or utility, as described."

On the part of the defendant, it was objected that there was no valid contract, inasmuch as the proposal contained in the defendant's letter of the 21st of June, 1855, which related to a matter not to be performed within a year, ought, to satisfy the 4th section of the statute of frauds, to have been accepted *in writing*; that the invention was not new; and that the defendant was at all events entitled to a verdict upon the plea of non concessit, on the ground that the alleged invention was not the proper subject of a patent.

In leaving the case to the jury, the learned judge told them, that, if one person proposes, and the other assents, it is a bargain; and that they were to consider whether there was a bargain between the plaintiff and defendant in June: and he left the question of novelty to them on the second issue.

*The jury returned a verdict for the plaintiff upon all the issues, [*77 damages 75*l*.

Norman, in Hilary Term last, obtained a rule calling upon the plaintiff to show cause why there should not be a new trial, on the ground of misdirection on the part of the learned judge,—first, "in not telling the jury that there was no evidence of the contract stated in the declaration, upon the ground that the contract was one which by the 4th

section of the statute of frauds was required to be in writing,—secondly, in not directing the jury that the plaintiff was not the first inventor, if the application of wire and composition to similar purposes was known and in use before the date of the patent,—thirdly, in not directing the jury to find a verdict for the defendant on the plea of non concessit.” Upon the first point, he referred to *Donellan v. Read*, 3 B. & Ad. 899 (E. C. L. R. vol. 23), *Cherry v. Heming*, 4 Exch. 631,† *Boydell v. Drummond*, 11 East, 142, *Tress v. Savage*, 4 Ellis & B. 36, *Clay v. Yates*, 25 Law J. Exch. 237, 1 Hurlst. & N. 78,† *Chitty on Contracts*, 6th edit. 2, and the notes to *Peter v. Compton* (Skin. 353), 1 Smith’s *Leading Cases*, 4th edit. 241,—upon the second, to *Saunders v. Aston*, 3 B. & Ad. 881, *Brunton v. Hawkes*, 4 B. & Ald. 541 (E. C. L. R. vol. 6), *Whitney v. Emmett*, 1 Baldwin (American), 303, *Regina v. Cutler*, 1 Macrory, P. C. 119, 137, *Losh v. Hague*, 1 Webster’s P. C. 200, *Hindmarch on Patents*, 95, 96, and *Huddart v. Grimshaw*, 1 Webster’s P. C. 85,—and upon the third, to *Nickels v. Ross*, 8 C. B. 679, and *Platt v. Else*, 8 Exch. 364.†

He also complained of the direction of the learned judge as to the definition of an “agreement,” and that the verdict was against the evidence,—citing *Boyd v. Hurd*, 25 Law Journ. Exch. 246.(a) But the *78] rule was “not granted on these points,—the court being of opinion that the direction in this respect was correct, and the learned judge not being dissatisfied with the verdict.

Knowles, Q. C., and *H. James*, showed cause.—There is no pretence for the first charge of misdirection. Why was the learned judge to tell the jury there was no contract, when the defendant’s letter of the 21st of June, containing the proposals upon which the declaration is framed, was proved to have been assented to? All the terms of the contract are in writing, and there is the signature of the party to be charged, which is all that the law requires: notes to *Birkmyr v. Darnell* (1 Salk. 27), 1 Smith’s *Leading Cases*, 224, 231.(b) In *Boydell v. Drummond*, 11 East, 142, the agreement was signed only by one. There was nothing to be done by the plaintiff which could possibly extend beyond the year. The authority of *Donellan v. Read*, 3 B. & Ad. 898, cannot be questioned since the decision of the Court of Exchequer in *Cherry v. Heming*, 4 Exch. 631,† 19 Law Journ. Exch. 63. The authorities upon the subject of acceptance by parol of a proposal in writing, are collected in *Dunlop v. Higgins*, 1 House of Lords Cases, 381: in all of them the terms are similar to those used here. In *Gaunt v. Hill*, 1 Stark. N. P. C. 10 (E. C. L. R. vol. 2), there was neither proposal nor acceptance. So, in *Cope v. Albinson*, 8 Exch. 185,† the defendant’s offer was not accepted. In neither of those cases was there an unques-

(a) “It may perhaps be taken as a general principle, that, when a parol agreement takes place, which it is understood is to be put into a written form, it is not binding until it is put into that form.” Per Pollock, C. B.

(b) And see the notes to *Peter v. Compton*, 1 Smith’s *Leading Cases*, 241.

vised proposal requiring only acceptance to complete it: see Chitty's Statutes, 2d edit., Vol. 2, p. 146. [WILLES, J., referred to *Mozley v Tinkler*, 1 C. M. & R. 692.†] In that case there was no acceptance. [CROWDER, J.—This *would not be an agreement requiring a [*79 stamp,—an acceptance by parol of a written offer or proposal not being within the stamp-act: *Hudspeth v. Yarnold*, 9 C. B. 625 (E. C. L. R. vol. 67).] (a) The 4th section of the statute of frauds applies not to the solemnities of the contract, but to the procedure: *Leroux v. Brown*, 12 C. B. 801, 824 (E. C. L. R. vol. 74). The answer to the first point, therefore, is, that this is not a case within the statute of frauds at all; and, if it is, there is a sufficient signed contract to satisfy the statute. Then, as to the second branch of the rule, there was abundant evidence of novelty; and the question was properly left to the jury. As to the third branch, the question is, whether the plaintiff warranted the thing he contracted to sell. [CRESSWELL, J.—If there is no warranty, we must treat the plea of non concessit as simply putting in issue the fact whether the patent passed the great seal or not. The objection to this part of the summing up seems to be, that the learned judge refused to leave the question of novelty to the jury on non concessit; but he had already left it to them upon the former plea. *Norman*.—The question intended to be raised by non concessit, is, whether or not the alleged invention was the proper subject of a patent. CRESSWELL, J.—Yes: provided there is a warranty.] In *Bedells v. Massey*, 8 Scott, N. R. 237, 7 M. & G. 680 (E. C. L. R. vol. 49), Tindal, C. J., says: "The plea [non concessit] puts in issue, not merely the existence of the letters patent, but the legal effect of them as stated by the plaintiffs." But he goes on to say,—“I see no inconvenience to the plaintiffs from allowing this plea: they have only to produce the letters patent to show that they have truly and properly stated the effect of them in the declaration.” And Maule, J., says: “Non concessit seems to have been frequently pleaded; and it appears to me to be the only way in which a defendant can put in issue whether that *which the plain- [*80 tif alleges to have been granted to him is within the terms of the grant, if truly construed.” [CRESSWELL, J.—*Nickels v. Ross*, 8 C. B. 679 (E. C. L. R. vol. 65), went far beyond that: it was held that a patent may be impeached under non concessit. The question of novelty is not pertinent to the question whether the article is a manufacture within the statute of James.] There being no express warranty here, the case comes within the rule in *Chanter v. Hopkins*, 4 M. & W. 399.† The plaintiff contracted to sell the patent such as it was. [CRESSWELL, J., referred to the judgment of Parke, B., in *Morley v. Attenborough*, 3 Exch. 500.†] If it were a question for the jury,—*Steiner v. Heald*, 6 Exch. 607,†—it was properly left to them. In *Lawes v. Purser*, 26 Law Journ. Q. B. 25, to a declaration for money due by the defendants

(a) But see *Hegarty v. Milne*, 14 C. B. 627 (E. C. L. R. vol. 78).

to the plaintiff for the payment of 10s. per ton by agreement upon and in respect of 500 tons of a substance used in manure, manufactured or sold by the defendants pursuant to the plaintiff's permission or authority, by means of the use of an invention comprised in letters patent granted to the plaintiff,—the defendant pleaded, that, at the time of the agreement, and at all times since, the letters patent were void, and the plaintiff had no such right or privilege as supposed; that the defendants were before and at the time of the agreement entitled as of right, and without license or permission from the plaintiff, to use the supposed invention, and sell the said manure, and the plaintiff never did grant any license to the defendants, and the same if given would have been void, and the defendants had no benefit from the agreement, and there was not any sufficient consideration for making the agreement or paying the money claimed. It was held, on demurrer, that the plea was no answer to the plaintiff's claim. Wightman, J., said: "The declaration is upon an executed contract. The plea is, that there was *81] no consideration for the *contract. Now, it appears that the defendant has had all that he bargained for. It is said that this is analogous to the case of a party who has no title assuming to grant a right that every one else exercised; but that is not the case here, because, for all that appears, the defendant has had the same benefit as he would have had if the patent were a valid one."

Montague Smith and Norman, in support of the rule.—The first question is, whether the contract declared on is a valid contract within the statute of frauds. It is submitted that it is an agreement not to be performed within a year, and therefore within the 29 Car. 2, c. 3, s. 4. The Guild, no doubt, had the benefit of it for a certain time: but, upon the face of it, it clearly was not to be performed within the year; part only of the money (50*l.*) being payable within the year, and the residue not until the expiration of three years, besides something to be done during the whole period the patent should enure. It must be borne in mind that this is not a contract for the absolute sale of the patent. *Donellan v. Read*, 3 B. & Ad. 899, was the case of an *executed* consideration, and the plaintiff had actually performed his part within the year. [CRESSWELL, J.—The contract must, with reference to this point, be good or bad at the time it is made.] No case has held, that, where the contract is executory on both sides, it is good because it may on the one side be performed within the year. [CRESSWELL, J.—In *Donellan v. Read*, performance by the landlord was a necessary ingredient; it was the consideration for the annual payments.] Parke, B., says in *Cherry v. Heming*, 4 Exch. 635,†—"In *Donellan v. Read*, the court considered that the words 'not to be performed' meant, not to be performed *on either side*, and did not include cases where the contract was performed on the one side. That was certainly in accord-

ance with the opinion expressed by *Lord Tenterden in *Bracegirdle v. Heald*, 1 B. & Ald. 722." In *Drant v. Brown*, 3 B. & [*82 C. 665 (E. C. L. R. vol. 10), 5 D. & R. 582 (E. C. L. R. vol. 16), A. entered into a written agreement with B. for the hire of a piece of land for the purpose of making bricks. C. afterwards made an offer *in writing* to let another piece of land to A. upon the terms contained in the agreement between him (A.) and B., and at a subsequent time A. *verbally* accepted this offer. In an action by C. for a breach of some of the terms of this contract, it was held that the written offer made by C. was admissible in evidence without being stamped. [CROWDER, J.—There was no complete agreement in writing there. What part of this agreement do you say was to be performed by the plaintiff beyond the year?] The fourth clause. [WILLES, J.—Not necessarily. The fifth clause seems the strongest one for you,—“that, in the event of the Guild not being carried on, the patent should revert to you, *subject to* the repayment of moneys paid to keep it up.” The words “subject to,” however, do not make a covenant: *Wolveridge v. Steward*, 3 M. & Scott, 561 (E. C. L. R. vol. 30), 1 C. & M. 644,† 3 Tyrwh. 637,—reversing *Steward v. Wolveridge*, 9 Bingh. 60, 2 M. & Scott, 75 (E. C. L. R. vol. 28): they amount to a condition for her benefit.] A signature by one party to the contract is not sufficient: *Gaunt v. Hill*, 1 Stark. N. P. C. 10; *Drant v. Brown*. Both must be bound: *Lees v. Whitcombe*, 5 Bingh. 34 (E. C. L. R. vol. 15), 2 M. & P. 86 (E. C. L. R. vol. 17); *Sykes v. Dixon*, 9 Ad. & E. 693 (E. C. L. R. vol. 36), 1 P. & D. 463. In *Warner v. Willington*, 3 Drewry, 523, 531, *Kindersley, V. C.*, says: “A memorandum of *agreement* supposes that the two parties have verbally made an actual contract with each other; and, when the terms of such contract are reduced into writing, and signed, that is sufficient to bind the party signing: but, if the memorandum is of an offer only, that assumes that there has been no actual contract between the parties.” [WILLES, J.—He afterwards says,—532,—“Taking it, then, as a memorandum, not of an agreement, but of *an offer not then finally accepted, the question is whether there [*83 has been a sufficient acceptance by the plaintiff before the defend- ant retracted. Now, what is alleged by the plaintiff as an acceptance, was, his sending the draft lease. This raises another question, viz. whether acceptance can be by parol without writing; and it is singular that I cannot find any case in which it is determined that parol acceptance of a written proposal is sufficient. But I think, upon principle, that parol acceptance would be sufficient; because, when one party has signed a written proposal, and the other expressly accepts it by parol,—as, if he says in express terms ‘I accept the proposal,’—it appears that that reduces it to a case of parol agreement come to between the parties, and a memorandum of the agreement signed by one, in which case it is clear that the signature of one party is sufficient to bind him,

although the other has not signed."] That is founded upon a dictum of the Lord Keeper (Cowper) in *Coleman v. Upcot*, 5 Vin. Abr. 527, 528, "that, if a man (being in company) makes offers of a bargain, and then writes them down and signs them, and another person then takes them up and prefers his bill, there will be a sufficient agreement;" the authority of which dictum is questioned in *Dart on Vendors*, 100. [CROWDER, J., referred to *Bird v. Blossie*, 2 Vent. 361,—“One wrote a letter signifying his assent to the marriage of his daughter with J. S., and that he would give her 1500*l.*; and afterwards, by another letter, upon a further treaty concerning the marriage, he went back from the proposals of his letter; and at some time afterwards declared that he would agree to what was proposed in his first letter. This letter was held a sufficient promise in writing within the statute of 29 Car. 2, called the statute against frauds and perjuries, and that the last declaration had set the terms in the first letter up again.”] That *84] which is called a *proposal* there was in *truth an *acceptance*. That class of cases met with the disapprobation of Sir J. Mansfield in *Allen v. Bennet*, 8 Taunt. 169, 173; and some further doubt is cast upon them in *Huddleston v. Briscoe*, 11 Ves. 583, 592. In *Mozley v. Tinkler*, 1 C. M. & R. 692,† there never was any agreement at all on the part of the plaintiff: the offer was conditional. The decisions on the stamp act are applicable here: no stamp is requisite on a mere proposal: *Vollans v. Fletcher*, 1 Exch. 20.† To constitute a complete agreement, the memorandum must show the acceptance, as well as the proposal. [WILLIAMS, J.—In *Coleman v. Upcot*, 2 Eq. Cas. Abr. 45, Lord Keeper Harcourt “decreed defendant to perform this agreement, for that it was directly within the statute of frauds, as being an agreement *signed by the party to be charged with the same*, and there was no need of its being signed by both parties; and plaintiff by his bill has submitted to perform his part of the agreement. This, though it was not at first a contract, but conditionally only, if the other would accept of it, yet, when the other had accepted of it, it was all one.”] The filing of the bill there reduced the whole into writing. The statute is not confined to cases where neither party can perform the contract within the year. *Donellan v. Read* and *Cherry v. Heming* were both cases where upon an executed consideration the defendants would have been liable, however void the agreement. Where a corporation has actually used and occupied land, for a corporate purpose, by permission of the owner, it is liable in assumpsit for use and occupation, though there be no contract under seal for such occupation: *Finlay v. The Bristol and Exeter Railway Company*, 7 Exch. 416;† *Lowe v. The London and North Western Railway Company*, 18 Q. B. 632 (E. C. L. R. vol. 83). *Sweet v. Lee*, 3 M. & G. 452 (E. C. L. R. vol. 42),‡ *Scott*, N. R. 77, was the case of an unexecuted agreement. In *Birch*•

*The *Karl of Liverpool*, 9 B. & C. 392 (E. C. L. R. vol. 17), 4 M. & R. 380, it was held that a contract whereby a coachmaker agreed to let a carriage for a term of five years, in consideration of receiving an annual payment for the use of it, but which, by the custom of the trade, was determinable at any time within that period upon the payment of a year's hire, was an agreement not to be performed within a year, within the meaning of the statute of frauds. *Bracegirdle v. Heald*, 1 B. & Ald. 722, and *Williams v. Jones*, 7 D. & R. 548 (E. C. L. R. vol. 16); 5 B. & C. 108 (E. C. L. R. vol. 11), are to the same effect. An instrument void as a lease for not being by deed, after the 8 & 9 Vict. c. 106, may still be valid as indicating the terms of the holding: *Tress v. Savage*, 4 Ellis & B. 36 (E. C. L. R. vol. 82); *Stratton v. Pettit*, 16 C. B. 420 (E. C. L. R. vol. 81); *Davis v. Jones*, 17 C. B. 625 (E. C. L. R. vol. 84). The statute has always been construed with strictness: *Cocking v. Ward*, 1 C. B. 858 (E. C. L. R. vol. 50); *Kelly v. Solari*, 9 M. & W. 54; † *Sarl v. Bourdillon*, 1 C. B. N. S. 188, (E. C. L. R. vol. 87). The rule is well stated by Tindal, C. J.,—in *Souch v. Strawbridge*, 2 C. B. 808, 814 (E. C. L. R. vol. 52),—“Assuming that the 4th section of the statute of frauds does apply to actions upon considerations that are executed, it seems to me that the contract in the present case is not within its terms. It speaks of ‘any agreement that is not to be performed within the space of one year from the making thereof;’ pointing to contracts the complete performance of which is of necessity extended beyond the space of a year. That appears clearly from the case of *Boydell v. Drummond*, 11 East, 142, the rule to be extracted from which, is, that, where the agreement distinctly shows upon the face of it that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but that, where the contract is such that the whole *may* be performed within a year, and there is no stipulation to the contrary, the statute does not apply.” Then, the learned judge ought to have *directed the jury to find for the plaintiff on the issue on non concessit, instead of leaving it to them, as he did, upon the facts. The effect of the plea of non concessit was fully considered in *Cooke v. Blake*, 1 Exch. 220.† The allegation that the plaintiff was an inventor, was material and traversable: *Routledge v. Grant*, 4 Bingh. 653 (E. C. L. R. vol. 13), 1 Moore & P. 717 (E. C. L. R. vol. 17). The mere application of a known article to a new use, the mode of application not being new, but, before the date of the patent, having been used in applying analogous articles to the same purpose, is not a manufacture within the meaning of the statute, and cannot be made the subject of a patent. [CRESSWELL, J.—Wire is old; plating is old: is the making of wire-rope not the subject of a patent?] No: a patent might be taken out for the machinery for plating or twisting it. *Darcy v. Allin, Noy*, 173, *Walker v. Congreve*; *Godson on Patents*, 56, *Phillips on Patents*, 127, 134, *Branton v.*

Hawkes, 4 B. & Ald. 541 (E. C. L. R. vol. 6), Kay v. Marshall, 5 N. C. 492, 7 Scott, 548, Pow v. Taunton, 9 Jurist, 1056, Hotchkiss v. Greenwood, 11 Howard's (American) Rep. 248, and Bean v. Smallwood, 2 Story's (American) Rep. 408, were also referred to.

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

In this case the plaintiff sought to recover damages for non-performance of a contract alleged to have been entered into by the defendant with her, whereby she was to assign a patent which she had obtained for making toys, in trust for an institution called the Ladies' Guild, which was under the management of the defendant; which patent was to be used by the Guild for making toys; and the plaintiff was to have 5 per cent. upon the profits made thereby, and the defendant *87] was to provide for the next payment to be made in respect of the patent; and, if the profits made did not reach a certain sum in the first and subsequent years, the plaintiff should have the right, upon giving one month's notice, and repaying any payments made to keep up the patent, to reclaim it, unless the deficiency in the year was made up within the month: and, in case of the Ladies' Guild not being carried on, the patent was to revert to the plaintiff, subject to her repaying any moneys paid to keep it up.

The declaration alleged as a breach that the defendant had not provided for the next payment to be made in respect of the patent.

The defendant pleaded, amongst other pleas, a denial of the alleged contract, that the invention patented was not new, and non concessit.

At the trial, it was proved, that the defendant had made the plaintiff a written proposal, signed by him, containing the terms of the proposed contract, to which she had assented by word of mouth; that she had allowed the Guild to have the possession and use of her patent until and after the time when the *next payment to be made* fell due, and had in all other respects fulfilled the terms of her agreement with the defendant; that the *next payment* had not been made by the defendant; and that, consequently, the patent became void.

Conflicting evidence was given as to the novelty of the invention.

The defendant took several objections to the plaintiff's right to recover, viz. that no valid contract had been proved; that the invention was not new; and that, at all events, the defendant was entitled to a verdict upon the plea of non concessit, upon the ground that the invention was not the proper subject of a patent. The case was, however, left to the jury, who found all the issues for the plaintiff, with 75*l.* damages.

*88] The defendant, in Michaelmas Term last, obtained a rule to set aside the verdict, and for a new trial, on the ground of alleged misdirection of the learned judge,—first, in not directing the jury that there was no evidence of the contract stated in the declaration, upon the ground that it was, within the 4th section of the statute of frauds,

an agreement "not to be performed within the space of one year from the making thereof," and that the proposal signed by the defendant, having been accepted by parol only, was not sufficient to satisfy the statute,—secondly, in not leaving to the jury that the plaintiff was not the first inventor, if her application of wire and composition, &c., to similar purposes was known and in use before the date of the patent,—and, thirdly, in not directing the jury to find a verdict for the defendant on the plea of non concessit.

With respect to the first point, we think it may be disposed of, either by reference to the terms of the agreement, by which all that was to be done by the plaintiff constituting one *entire* consideration for the defendant's promise was capable of being performed within a year, and that it does not appear from its terms, which were undoubtedly agreed to in part, that any part of what the plaintiff was to do constituting such consideration, was intended to be postponed until after a year from the time of making the agreement; so that *Donellan v. Read*, 8 B. & Ad. 899 (E. C. L. R. vol. 23), and the judgment of Lord Wensleydale in *Cherry v. Heming*, 4 Exch. 631,† are authorities in favour of the plaintiff;—or, by holding, as we are prepared to do, upon the authority of the opinion expressed by Vice-Chancellor Kindersley in *Warner v. Willington*, 8 Drewry, 582, that a proposal signed by the person to be bound, and accepted by word of mouth by the person to whom it is made, is a sufficient agreement to satisfy the 4th section of the statute of frauds.

*Upon the second question, viz. that of novelty, it is enough to say that there was evidence on both sides, which the judge seems [*89 to have left to the jury, reminding them of what was proved on each side, and pointing out the improbability of the evidence of one witness for the defendant, which no doubt the jury must have disbelieved. This was not misdirection; and, as to this part of the case, there is no complaint against the verdict on any other ground.

With respect to the third and last point, viz. whether the judge ought to have directed the jury to find a verdict for the defendant upon the plea of non concessit, on the ground that the invention was not the proper subject-matter of a patent,—it is necessary to consider the effect of this plea as pleaded to the present declaration, which alleges a contract for the assignment by the plaintiff of the letters patent, to be used as therein mentioned by the Guild: and we apprehend that this is a correct expression of the contract, and that such a contract involves no warranty that the invention was new, or was a manufacture within the statute of James, but merely that Her Majesty had granted to the plaintiff the letters patent which she proposed to assign. In short, the defendant in this case, as in *Hall v. Conder*, *antè*, p. 22, contracted for the use of the plaintiff's right such as it was, without regard to whether it could be sustained upon litigation or not: and there is nothing

unreasonable or uncommon in such a bargain. Upon this construction of the declaration, the plea of non concessit would be bad if it put in issue more than the granting of the letters patent: and, where a plea is capable of two constructions, one of which would make it bad and the other good, it ought to be construed so as to make it good. Therefore, non concessit, in this case, only puts in issue the grant by Her *90] Majesty to the plaintiff of the letters patent; and *all the learning introduced by Mr. *Norman*, in his laborious argument for the defendant, as to what sort of invention is the proper subject of a patent, was foreign to the question actually raised by the plea. The learned judge was right in ruling that proof of the letters patent entitled the plaintiff to a verdict upon this issue.

All the points raised for the defendant being thus disposed of, the rule must be discharged. Rule discharged.

END OF HILARY VACATION.

CASES
ARGUED AND DECIDED
IN THE
COURT OF COMMON PLEAS,
AND IN THE
EXCHEQUER CHAMBER,
IN
Easter Term,

IN THE TWENTIETH YEAR OF THE REIGN OF VICTORIA. 1857.

The Judges who usually sat in Banco in this Term, were,—

COCKBURN, C. J.,
CRESSWELL, J.,

CROWDER, J.,
WILLES, J.

REGULÆ GENERALES.

Endorsement of Notice on Writs on Contract under 20l.

It is ordered that plaintiffs suing in contract for 20l., or less, may, if they claim costs, endorse on the writ of summons the following notice:—

“Take notice, that, if judgment be signed for default of appearance, the plaintiff will without summons apply to a judge for his costs of suit, unless before such judgment you shall give notice to him or his attorney that you intend to oppose such application.”

*And it is further ordered, that if the defendant give such notice, the plaintiff shall proceed by summons and order. [*92

But, if the defendant give no such notice, the plaintiff may produce such endorsement to a judge at Chambers, for an order for costs, ex parte, and if the judge shall sign his name to the endorsement, such signature shall be an order for costs, and the master may tax them

thereon accordingly. In case of any application for costs without such endorsement, the plaintiff shall not be entitled to more costs than if he had made such endorsement, unless a judge shall otherwise order.

Entry of Satisfaction on Judgments.

Upon a satisfaction-piece duly signed and attested in accordance with the 80th rule of Hilary Term, 1853, being presented to the clerk of the judgments of the masters in the court in which the judgment has been signed, he shall file the same, and enter satisfaction in the judgment-book against the entry of the said judgment; and no roll shall be required to be carried in for the purpose of entering satisfaction on a judgment.

CAMPBELL.	E. V. WILLIAMS.
A. E. COCKBURN.	J. S. WILLES.
FRED. POLLOCK.	SAMUEL MARTIN.
W. ERLE.	G. BRAMWELL.
CHARLES CROMPTON.	W. F. CHANNELL.

April 23d, 1857.

*98] *GOODMAN v. SPENCER. *April 20.*

The Gun-Barrel Proof Act, 1855,—18 & 19 Vict. c. cxlviii.,—does not exempt gun-barrels which have been *provisionally* proved at Birmingham from the necessity of *provisional proof* in London, if required to be marked there with the *definitive* proof-mark of the Gun-Makers' Company.

THIS was an action against the proof-master of the Gunmakers' Company for refusing to receive for proof and to prove and mark certain gun-barrels of the plaintiff, in breach of his alleged duty under the Gun-Barrel Proof Act, 1855, 18 & 19 Vict. c. cxlviii.

The first count of the declaration stated that the plaintiff, after the making and coming into operation of the Gun-Barrel Proof Act, 1855, caused to be sent and taken to the proof-house of the Gun Makers' Company, maintained by them for the purposes in the said act mentioned, divers barrels of him the plaintiff constructed for small-arms, and which by the provisions of the said act were required to be proved by definitive as well as by provisional proof, that is to say, one rifled barrel, and two double-barrelled shooting-pieces for firing small-shot, and which said barrels had been theretofore duly proved by provisional proof at the Birmingham proof-house, as required by the said act, and had been duly marked as so proved, and which said barrels were at the time they were so sent and taken in the proper state for proof by definitive proof; and the plaintiff was desirous of having the said barrels proved by definitive proof, and was ready and willing to leave the same at the Gun Makers' Company's said proof-house, and to have the

same duly proved by such definitive proof, and marked as so proved, and to do all things necessary to entitle him to have the same so marked and proved; and all things so necessary were then done and happened,—of all which the defendant, then and thence hitherto being the proof-master of the said last-mentioned company, then had notice, and was then requested by the plaintiff to receive the said barrels so brought to the said proof-house as aforesaid, *and to prove the same thereat [*94 by definitive proof according to the said act, and to mark the same as duly proved, if the same should be found of proof: Yet the defendant, contrary to his duty as such proof-master, would not receive the said barrels nor prove the same as aforesaid, and refused so to do; whereby the plaintiff was prevented from having the said barrels so proved, and was put to expenses, and divers other expenses to which he had been put were rendered useless: And the plaintiff claimed 50l.

Second count,—And the plaintiff also said that the averments and allegations in the first count mentioned were true, and that he was and is personally interested in having the said barrels so received, proved, and marked as in the first count mentioned, and in having the same re-delivered to him, and that he had sustained, or might sustain, damage by the non-performance by the defendant of his duty as such proof-master in that behalf as aforesaid, and that performance of such duty had been demanded by the plaintiff of the defendant, and been refused by him: And the plaintiff claimed a writ of mandamus commanding the defendant to receive the said barrels at the said proof-house of the said Gun-Makers' Company, and duly prove the same thereat by definitive proof, according to the scale in force under the said act, and to duly mark such barrels when proved (if found of proof) as duly proved as aforesaid, according to such scale, and, upon repayment of all sums actually paid by such company in respect of the carriage of such barrels and their delivery at such proof-house, and their re-delivery when proved, and on payment of the charges for proving and marking as proved, by the said act authorized, to deliver the said barrels so proved and marked as proved to the plaintiff.

Second plea,—that the plaintiff was not at the time of the said barrels being so sent and taken as in the *declaration alleged, [*95 ready or willing to allow the said Gun-Makers' Company to prove the said barrels by the provisional proof in the said act mentioned, and that the said barrels were never proved by the said Gun-Makers' Company by the provisional proof in the said act directed; and that the said Gun-Makers' Company were always ready and willing to prove the said barrels by the provisional proof in the said act directed,—of all which premises the plaintiff always had notice, and the plaintiff always refused to allow the said Gun-Makers' Company to prove the said barrels by the provisional proof in the said act directed; where-

fore the defendant so refused to receive and prove the said barrels as in the declaration in that behalf was alleged.

To this plea the plaintiff demurred, the ground stated in the margin being, "that provisional proof by the Gun-Makers' Company is not a condition precedent to definitive proof by that company; but that they are bound to prove definitively barrels which have been duly proved provisionally at the Birmingham proof-house." Joinder.

Mellor (with whom was *Field*), in support of the demurrer. (a)—The question presented for the consideration of the court upon this demurrer, is, whether the Gun-Makers' Company in London and also the *96] Gun-Makers' Company at Birmingham are bound respectively to receive for definitive proof gun-barrels which have been provisionally proved at the other place. It appears that all barrels are manufactured at Birmingham, and that, previously to the 58 G. 3, c. 115, the only proof-house was that of the Gun-Makers' Company in London. That act established a proof-house at Birmingham, for the proof of barrels there. It being found that that statute was extensively evaded, another act was passed,—55 G. 3, c. 59,—to amend the former act. The second section of the amended act required that every barrel for the making of any gun, fowling-piece, &c., or any other description of fire-arms usually called small-arms, should be sent immediately from the manufacturers themselves to the proof-house of the Gun-Makers' Company or to the proof-house established by that act, &c. In 1855, the two companies united for the purpose of obtaining the act which now regulates the proof of gun-barrels in England, 18 & 19 Vict. c. cxlviii. This act begins with a recital of the charter of the Gun-Makers' Company (14th March, 1687), and of the two first-mentioned acts; and then proceeds to recite that "it is expedient that better provision be made for insuring that small-arms made in England be properly and carefully manufactured, and, in order thereto, that better provision be made for the proving and marking as proved of all such parts of small-arms as for securing the safe user thereof ought to be proved, and that further powers be conferred on the two companies [viz. the Birmingham Company and the Gun-Makers' Company of London] respectively for insuring compliance with the requirements of this act; and that it is expedient that all smooth-bored single barrels be proved once only, and by definitive proof, and only when in the state in that behalf by this act provided, and that all rifled barrels and double barrels be proved by *97] provisional and also by definitive proof as respectively by this act provided." By the interpretation clause, s. 4, "*Small-arms*"

(a) The points marked for argument on the part of the plaintiff, were,—

"That the Gun-Barrel Proof Act, 1855, does not require that gun-barrels which have been duly proved provisionally at the Birmingham proof-house, should be again proved provisionally at the proof-house of the Gun-Makers' Company, before being definitively proved by the said last-mentioned company, as required by the said act: and

"That the Gun-Makers' Company were bound to prove the barrels in question by definitive proof."

includes small-arms of every description, and whether of present use or of future invention, respectively, adapted for the discharge of bullets, shots, or other projectiles, either by means of the explosion, ignition, or other action of gunpowder, gun-cotton, fulminating powder, or other substance, whether of present use or of future invention or application, or by means of the expansion of steam or gas, or by any other means, not being merely mechanical means, except air-guns as at present manufactured: "*Barrel*" includes every barrel of every small-arm and every breech of every small-arm, and every part of every small-arm, which part would in the user of the small-arm contain all or any part of the charge of the small-arm, and every part of every small-arm, in, from, or through which part, in the user of the small-arm, all or any part of the charge thereof would be exploded or discharged: "*Barrel*" also includes all barrels welded, forged, or cast, finished or unfinished, or in any other progressive state of manufacture, and any and every part of a barrel: "*Double Barrel*" includes every barrel constructed for every small-arm consisting of two or more barrels: "*Provisional Proof*" means proof of a barrel liable in any subsequent stage of manufacture to be reduced in strength before it forms part of a small-arm in a finished state: "*Definitive Proof*" means proof of a barrel not liable in any subsequent stage of manufacture to be reduced in strength before it forms part of a small-arm in a finished state: "*Proof*" includes "provisional proof" and "definitive proof," and means, as the case requires, "provisional proof" or "definitive proof." The 76th section enacts that "each of the two companies shall from time to time maintain a proper public proof-house, with all necessary things for proving barrels thereat, and shall at all times keep the same in proper order and condition for the proving of all such barrels *as are from time to time sent to such respective public proof-house for proof thereat, and shall keep there a set of standard plugs to [*98 determine the size of barrels brought to be proved." Section 77 enables the Gun-Makers' Company from time to time to make such rules and regulations as appear to them necessary for receiving at their proof-house barrels for proof, and for proving them, and marking as proved the same, according to the provisions of this act, and for re-delivering the same when so proved and marked. The 78th and subsequent sections in like manner enable the Birmingham Company to make rules for regulating the management of their proof-house. The 84th section makes the proof-master of the Gun-Makers' Company responsible for the execution by himself or his assistants of the several duties with respect to the receiving, proving, marking as proved, and delivering barrels by the act imposed on the Gun-Makers' Company: and s. 85 imposes a like responsibility on the proof-master of the Birmingham Company. The clause upon which the question in this case mainly turns is the 86th, which enacts that "each of the two companies shall

receive all barrels brought to the proof-house of that company in the proper state for proof, and whether or not theretofore proved, and shall duly prove the same thereat according to the scale in force under this act, and shall duly mark such barrels when proved (if found of proof), as duly proved according to such scale; and, upon repayment of all sums actually paid by that company in respect of the carriage of such barrels and their delivery at such proof-house and their re-delivery when proved, and on payment of the charges for proving and marking as proved by this act authorized, shall deliver the barrels so proved and marked as proved to the persons entitled to receive the same." This clause, it is submitted, applies to all barrels brought for proof, whether for provisional or for *99] definitive proof. The 87th section enacts, that, "after the commencement of this act, a barrel shall not be used in the making of any small-arm, unless the barrel have been duly proved at the proof-house of the Gun-Makers' Company, or at the Birmingham proof-house, or at some other public proof-house established by law, and duly marked as proved." The 88th section provides, that, "after the commencement of this act, a small-arm shall not be sold or exchanged, or exposed or kept for sale, or exported, unless the barrel or barrels thereof have been duly proved," &c. Section 89 enacts that "every double barrel provisionally proved according to this act, and at any time thereafter reduced in strength in any progressive stage of the manufacture thereof, shall for the purposes of this act be deemed an unproved barrel, except for the purpose of receiving and until it shall have received the definitive proof." The 90th enacts, that, "if any barrel which shall be marked as proved under this act shall by any process of manufacture, or by any other means whatsoever other than the user and wear and tear thereof, be unduly reduced in substance or strength so as that the mark thereon does not duly represent the proof which if then duly proved it would bear, every such barrel shall for the purposes of this act be deemed an unproved barrel." Sections 91 and 92 provide for the cases of the removal or defacing of the proof-mark. Section 93 enacts that "all barrels from time to time brought to the proof-house of the Gun-Makers' Company, the Birmingham proof-house, or any other public proof-house established by law for proof, shall be proved according to the rules, regulations, and scale in that behalf according to the provisions of this act in force." The 113th section imposes a penalty not exceeding 20*l.* upon every officer or other person engaged in the management of the proof-house of the Gun-Makers' Company, or the Birmingham proof-house, acting contrary to or neglecting his *100] duty in any of the *following (amongst other) particulars,—
"1. Not *receiving* at the proof-house any barrel duly brought or sent thereto for proof: 2. Not duly *proving* at the proof-house any barrel duly brought or sent thereto for proof: 3. Not duly *marking as proved* any barrel duly proved at the proof-house, and duly found

of proof: 4. Not duly delivering to the person entitled thereto any barrel duly proved at the proof-house, and duly found of proof." Schedule (B) contains rules and regulations applicable to the proof of small-arms. It begins with classifying them as follows:—*First class*,—comprising single-barrelled military arms of smooth bore. *Second class*,—comprising double-barrelled military arms of smooth bore, and rifled arms of every description, whether of one or more barrels, or constructed of plain or twisted iron. *Third class*,—comprising every description of single-barrelled birding and fowling-pieces for firing small shot; and also those known by the names of Danish, Dutch, Carolina, and Spanish. *Fourth class*,—comprising every description of double-barrelled birding and fowling-pieces for firing small shot. *Fifth class*,—comprising revolving and breech-loading small-arms of every description and system." The "rule of proof" is as follows:— "The gunpowder used for proof shall be of equal quality and strength with that which is now used by the board of ordnance. The balls used for the proof of barrels of all classes shall be of lead, and spherical, and of the size and weight prescribed by the scale for proof. *Barrels for arms of the second class and of the fourth class, and for breech-loading arms of the fifth class, shall be proved provisionally and definitively, and barrels for all other arms shall be proved once definitively.*" The "conditions precedent to proof," are as follows:—"Barrels for arms of the first class shall not be qualified for proof until they shall be in a fit and proper state for setting up. Barrels for arms of the third class shall not be qualified for proof until they shall be in a fit and proper state for setting up, with the proper breeches in; and all barrels [*101 lumped for percussioning shall be proved through the nipple-hole, with the proper pins or plugs in. Barrels for arms of the second and fourth classes,—*For provisional proof*: If of plain metal, shall be bored and ground, having plugs attached, with touch-holes drilled in the plugs, of a diameter not exceeding one-sixteenth of an inch. If any touch-hole shall be enlarged, from any cause whatever, to a dimension exceeding in diameter one-tenth of an inch, the barrel shall be disqualified for proof. Notches in the plugs instead of drilled touch-holes shall disqualify for proof. If of twisted metal, they shall be fine-bored, and struck up, with proving plugs attached, and touch-holes drilled as in the case of plain metal barrels. *For definitive proof*,—The barrels, whether of plain or twisted metal, shall be in a finished state, ready for setting up, with the breeches in the percussioned state, break-offs fitted and locks jointed; the top and bottom ribs shall be rough struck up, pipes, loops, and stoppers on. All rifle-barrels must be rifled; the top and bottom ribs of double barrels shall be struck up, pipes and stoppers on, the proper breeches in, and the thread of the screws shall be sufficiently sound and full for proof. Barrels for revolving-arms of the fifth class shall have the cylinders with the revolving action attached and complete. Barrels for breech-loading arms of the fifth class shall be subject to

provisional proof, according to the class to which they belong, and to definitive proof when the breech-loading action is attached and complete." Provision is then made for the marks of proof, and the mode of affixing them. The proportion of powder for the proof of arms of the second class is twice as great for provisional proof as it is for definitive proof, —4812 grains for the former, and 2406 grains for the latter; and for *102] the fourth class 3850 grains for *provisional, and 2406 grains for definitive proof. And a separate fee is payable for each description of proof. All gun-barrels are manufactured in the rough state in Birmingham or its neighbourhood; those called London made being finished in London. Single barrels undergo but one, the definitive proof; and, before they are submitted to that proof, they are reduced to the condition in point of strength at which they are intended to be used. Where they are intended to be worked into double barrels, they are submitted to the provisional proof, to ascertain their fitness to be manufactured into double-barrelled guns. It is convenient, therefore, to the gun trade that the barrels should be provisionally proved before they are welded together, and that that provisional proof should be applied at Birmingham; for, the application of the provisional proof after the barrels are welded together subjects them to an undue risk. There is nothing in the statute to make it a condition precedent to their being definitively proved, that the barrels should have undergone the provisional proof *at the same place*. [COCKBURN, C. J.—Is there anything in the statute making the provisional proof by the one company conclusive on the other? What is there, when a barrel marked as provisionally proved by the one company is presented to the other for definitive proof, to satisfy them that the provisional proof-mark is properly applied?] The act (s. 99) makes it a misdemeanor to place the proof-mark on an unproved barrel. Besides, the provisional proof-mark of the Gun-Makers' Company might equally be forged. [COCKBURN, C. J.—It may be that the Gun-Makers' Company are bound to know their own mark: but there is nothing to make it obligatory upon them to give credit to the Birmingham proof-mark.] There is nothing to enable the Gun-Makers' Company to recognise their own mark with more certainty than that of the Birmingham Company, or foreign proof-
*103] marks, the provisions as to *which are in ss. 105—109. [CROWDER, J.—The Gun-Makers' Company would equally refuse to recognise the provisional proof-mark if it were clearly proved to be the Birmingham mark: the broad question is, whether the Gun-Makers' Company are bound to prove and to mark with the definitive proof-mark barrels which have been provisionally proved at Birmingham. CRESSWELL, J.—By s. 106, barrels with foreign proof-marks (registered) are exempted from the provisions of the act, unless they purport to be of English manufacture, in which case they are to be deemed unproved barrels.] Convenience to the trade and to the public will manifestly be best attained by adopting the more liberal and natural

construction of the statute. [COCKBURN, C. J.—Before the passing of the Gun-Barrel Proof Act, 1855, the two companies were independent of each other. Do they not still remain so?] The principal alteration effected by that act, is, the introduction of provisional proof.

Byles, Serjt. (with whom was *T. Jones*), contra.(a)—The main ground upon which the defendant relies has already been anticipated by the Lord Chief Justice. These proof-marks are provided for the protection of the public, for insuring the proper manufacture of small-arms, and for securing as far as may be the safe user thereof. The material sections are the 86th, 87th, and 88th. The 86th provides that each of the two companies shall receive all barrels brought to the proof-house of that company in the proper state for proof, and whether or not theretofore proved, and shall duly prove the same *thereat [*104 according to the scale in force under this act, and shall duly mark such barrels when proved (if found of proof), as duly proved according to such scale: and the 87th and 88th sections respectively prohibit the use of barrels in the making of any small-arm, or the sale or exposure for sale of a small-arm, unless the barrels thereof have been duly proved at one or other of the legal proof-houses,—not partly at the one, and partly at the other; “proved” must mean *entirely* proved. There is nothing in the act to require the one company to give credit to the provisional proof-mark of the other,—much less to compel them under a penalty to recognise it. These marks are easily forged: but each company may have peculiar means of identifying its own mark, by private arrangements not patent to the ordinary class of forgers. Various things are requisite to entitle a barrel to the provisional proof-mark. When required to impress the piece with the definitive proof-mark, the Gun-Makers’ Company are called upon to vouch that the provisional proof-mark has been properly put upon it. Is that reasonable, where the provisional proof is made by the other company? [CRESSWELL, J.—Would they be *justified* in putting their definitive proof-mark upon a piece the barrels of which had been provisionally proved by the Birmingham Company?] It is submitted that they would not: but it is one thing to say that they are *justified*, and another that they are *bound*, and that under a penalty. So far from there being anything in the act of parliament to compel the Gun-Makers’ Company to do that the omission of which is complained of, the 115th section expressly provides, “that, except as is by this act expressly provided, this act or anything therein shall not take away, lessen, alter, or prejudice any of the estates, franchises, ordinances, rules, regulations, rights, powers, or privileges of the Gun-Makers’ Company, and this act, or anything therein, shall not in any manner

(a) The point marked for argument on the part of the defendant, was,—“That, inasmuch as the plaintiff refused to allow the Gun-Makers’ Company to prove the barrels by provisional proof, the plaintiff was not entitled to complain of the defendant’s having refused to prove them by *definitive proof*.”

*105] "derogate from or affect the charter of that company." And there is nothing unreasonable in the defendant's objection. Suppose a gun bursts in consequence of defective proof, which company is to be charged with negligent performance of its duty, if one proof is made at each place? It would be a case of divided responsibility, which in most cases is no responsibility at all.

Mellor, in reply.—The company could not incur any liability, as suggested, provided they duly make the proof they profess to make. The manufacturer or the seller alone incurs liability, if he sells or exposes for sale an improperly proved gun. [CRESSWELL, J.—What evidence are the companies to have of the provisional proof, before they can be called upon to mark a barrel with the definitive proof-mark?] The provisional proof-mark is sufficient evidence. [CRESSWELL, J.—The statute does not say so.] It does not in terms: but it is submitted that that is the necessary effect of the 86th section, coupled with the conditions and regulations contained in the schedule. [COCKBURN, C. J.—There is no express provision, that, with a view to definitive proof, it must appear that the barrel has already been provisionally proved. CROWDER, J.—The question is, whether that is not of necessity involved in the 86th section.]

COCKBURN, C. J.—I am of opinion that the second plea is a good answer to the action, and consequently that our judgment must be for the defendant. It is clear, from the general scope of the act of parliament, that what was intended under the new system of proof introduced thereby, was, that, with reference to certain descriptions of small-arms, there should be a provisional proof of the barrel in an unfinished state, and a further and definitive proof when the piece has attained its more finished condition preparatory to mounting, and that the provisional proof should have precedence of the definitive proof, and

*106] that neither of the two companies is bound to prove and mark as definitively proved any barrel so requiring provisional proof, unless it has previously undergone such provisional proof. The question is, whether, one company having proved a barrel provisionally, the other is bound on request to make the definitive proof. I am of opinion that there is nothing in the act to make it obligatory upon either company definitively to prove barrels which have been provisionally proved by the other. It appears, that, previously to the passing of the 18 & 19 Vict. c. cxlviii., the two companies,—the Gun-Makers' Company of London, and the Birmingham Company,—had each an entirely separate and independent existence: and I find nothing in that act to denote that they are to be considered as amalgamated. I readily concede that it would make little or no difference to the public if the provisional proof by the one company were to be binding upon the other. But all I can say is, that that is matter for legislative consideration, and that we are bound by what the legislature has said. If

there were any doubt upon the language of the 86th section and the scale therein referred to, there is a clear and unambiguous provision in s. 115, that, "except as is by this act expressly provided, this act or anything therein shall not take away, lessen, alter, or prejudice any of the estates, franchises, ordinances, rules, regulations, rights, powers, or privileges of the Gun-Makers' Company, and this act or anything therein shall not in any manner derogate from or affect the charter of that company." Now, it would, I apprehend, be materially interfering with the interests and privileges of the Gun-Makers' Company to hold them to be bound to give the definitive proof to barrels which have been provisionally proved by the Birmingham Company. There being nothing in the act making it obligatory upon them to do so, we must infer from the absence of any such provision that it was not intended: and the saving of the company's rights by s. 115 [*107] leads my mind irresistibly to the conclusion that the legislature did not intend that the two descriptions of proof should be made by the two companies indiscriminately, or that it should be incumbent on either to give faith and credence to the proof-mark of the other. I therefore think the defendant has not been guilty of the breach of duty with which he is charged, and consequently that he is entitled to the judgment of the court upon this demurrer.

CRESSWELL, J.—I am of the same opinion. It is very possible, that, if this matter had been properly presented to the minds of the legislature at the time of the passing of the recent act, some more clear provision upon the subject would have been introduced. I find this to be quite clear,—that certain descriptions of small-arms are required to be proved in two ways, viz. by provisional and by definitive proof; and that each of the two companies is bound to prove all such barrels as are presented to them for proof. But I do not find anything in the act which says that either company shall be satisfied with the provisional proof of the other. I therefore think the whole proof must be made by one company.

CROWDER, J.—I also am of opinion that the defendant is entitled to judgment in this case: and the ground of that opinion is, that the statute 18 & 19 Vict. c. cxlviii. was passed, as the preamble states, for the purpose of uniting in one act, and extending, the powers already vested, whether by charter or by statute, in the two companies; and that, in construing it, we must deal with it as if it consisted of two separate acts each applicable to each company. There is nothing in any part of it to show that what is done under it by the one [*108] company is to form part of any proceeding by the other. The only practical alteration with regard to the proofing of small-arms, is, that, as to certain descriptions of arms, an additional proof is required: but there is nothing to warrant the conclusion that the provisional proof may be made by the one company, and the definitive proof by

the other. I cannot, however, see that the safety of the public would be in any degree endangered if that were so. But, looking at the whole scope of the act, and more particularly at the saving of rights contained in the 115th section, I am unable to come to any other conclusion than that the acts of the two companies are to be wholly independent of each other: and it is upon that ground, and upon that ground alone, that I have arrived at the conclusion that the defendant is entitled to the judgment of the court.

WILLES, J.—I am of the same opinion. The preamble shows that there were two companies having a separate and distinct existence before the passing of this act,—the Gun-Makers' Company, which was incorporated by charter of Edward the Second,—and the Birmingham Company, which was established in the year 1818, for the convenience of the Birmingham gun-trade. Down to the year 1855, it had not been thought necessary that the description of guns called small-arms should be submitted to more than one proof. But, in consequence of the modern improvements in the manufacture of guns, it was thought by persons experienced on the subject to be expedient, in the case of barrels to be reduced in strength by the operation necessary to convert them into guns of particular descriptions, viz. rifled-arms or double-barrelled guns, that there should be two proofs,—one, of the barrel in its original state,—the other, when it should be in the state in which it
 *109] is to be actually used. Accordingly, this act for the first time introduces the necessity of provisional and definitive proof,—the two when made constituting the proof necessary before the gun can in its complete state be sold or used. I see nothing in the act to put this double proof upon a different footing from the proof which was required before its passing: it merely substitutes the two operations for the single one; and, unless there is something in the act which expressly provides the contrary, the entire operation which constitutes the proof must take place either in Birmingham or in London. I find nothing of that kind in the statute. On the contrary, the 86th section enacts that “*each of the two companies shall receive all barrels brought to the proof-house of that company in the proper state for proof, and whether or not theretofore proved, and shall duly prove the same thereat according to the scale in force under this act, and shall duly mark such barrels when proved (if found of proof), as duly proved according to such scale.*” The language of that section seems to me to be carefully distinct as to proof by each company and at each place. It is said that the safety of the public is equally well secured by the proof taking place at Birmingham as in London. Whether that be so or not, I cannot tell. Looking at the scale for proof contained in the schedule, I am not sure that the provisional proof might not be made less carefully at the one place than at the other, without any actual failure to fulfil its directions: and I can quite conceive that the person having the

greater skill or prestige should strive to retain it. At all events, there is nothing in the act to impose upon the Gun-Makers' Company the duty which is sought by this action to be imposed upon them, and consequently the action is not maintainable.

Judgment for the defendant.

*WYATT v. THE DARENTH VALLEY RAILWAY COM-[*110
PANY. April 25.

An application, under the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, s. 36, for leave to issue a scil. fa. against a shareholder on a judgment against the company, was founded upon an affidavit which stated that two writs of scil. fa. had been issued against the company, and returned nulla bona; that deponent believed, from inquiries which he had made of the secretary and a shareholder, that the company had not at the time of the recovery of the judgment, or since, any property, goods, or chattels, and that any execution against them would be ineffectual; that all due diligence and means had been used to obtain satisfaction; and that the deponent, as clerk to the company's solicitor, had transacted much of their legal business, and thereby became well acquainted with their position and circumstances:—Held, sufficient. It is no answer to a motion for a scire facias against a shareholder of a joint stock company, under the 8 & 9 Vict. c. 16, s. 36, upon a judgment obtained against the company, that the company is indebted to the shareholder against whom execution is sought, to a greater amount than that of his unpaid calls, for moneys disbursed by him as a director on behalf of the company.

VAUGHAN WILLIAMS, on a former day in this term, obtained a rule calling upon one Eli Richards to show cause why a scire facias should not issue against him as a shareholder of the Darenth Valley Railway Company, to have execution to satisfy a judgment obtained by the plaintiff against the company for 181*l.* 14*s.* 11*d.*, pursuant to the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, s. 36.

The affidavit upon which the motion was founded was that of the managing clerk of the plaintiff's attorney, which stated, in substance, that the action was brought to recover 276*l.* 19*s.* 2*d.*, claimed to be due to the plaintiff from the company as the balance of his costs of and attending the procuring and passing The Darenth Valley Railway Act, 1853 (16 & 17 Vict. c. lxxiii.); that judgment was signed against the company, for want of appearance, on the 18th of October, 1856, for 287*l.* 7*s.* 2*d.*; that writs of f. fa. were duly issued thereon on the 24th of October, into Middlesex and Kent, and afterwards returned nulla bona; that two several sums of 64*l.* 9*s.* 7*d.* and 84*l.* 2*s.* 8*d.* had been recovered against other shareholders, leaving an unsatisfied balance of 181*l.* 14*s.* 11*d.*; that the deponent had made many inquiries from persons connected with the company, and likely to be informed on the subject, and particularly from two persons named (one of them being or having been the secretary of the company), as to whether the company had any property, goods, or *chattels, and from such [*111 inquiries he believed that the company never had, and at all events did not at the time of the recovery of the said judgment, or at

any time after, have any property, goods, or chattels whatever beyond their books, and that any execution against them would be ineffectual; that all due diligence and means had been used to obtain satisfaction of the said judgment from the said company by execution against their property and effects; that the plaintiff's attorney had been solicitor to the company, and that the deponent, as his clerk, attended to and transacted much of the legal business thereof, and thereby became well acquainted with the position and circumstances of the company; that Mr. Richards was, as appeared by the register, owner of fifty shares in the company, upon which there remained to be paid up 5*l.* per share; and that he had been duly served with notice of this application.

Raymond showed cause.—The affidavit upon which this rule was obtained is not sufficient to satisfy the court that due efforts have been made to obtain satisfaction from the property of the company. The deponent does not show that any application whatever has been made at the principal, and for anything that appears the only, office of the company: he states that he has made inquiries; but not there. [CRESSWELL, J.—Is it not a sufficient *prima facie* denial of their having any available property? Possibly it might be answered.] The case of *Hitchins v. The Kilkenny and Great Southern and Western Railway Company*, 10 C. B. 160 (E. C. L. R. vol. 70), shows that a mere return of *nulla bona* amounts to nothing. The affidavit here does not carry the case a step further than did that which, in *King v. The Parental Endowment Assurance Company*, 11 Exch. 443,† was held insufficient. In that case, an application under the 7 & 8 Vict. c. 110, *112] by a judgment-creditor of a joint stock company, for *leave to issue execution against a shareholder, was founded on affidavits, which stated that a writ of *fi. fa.* was issued by the plaintiff against the goods of the company, and placed in the hands of the sheriff, to be executed; that the sheriff returned *nulla bona*; that the chief office of the company was closed, and that no business, to the best of the deponent's belief, was carried on there; and that he believed that any execution against the property and effects of the company would be wholly unavailing: and it was held, that the facts disclosed did not show that the plaintiff had used due diligence to obtain satisfaction of his judgment by execution against the company, since there was no affidavit of the sheriff's officer showing what he had done under the writ. Parke, B., there says: "The court ought not to allow execution to issue against a shareholder, unless they are satisfied that due diligence has been used to obtain satisfaction of the judgment by execution against the company. Now, what has been done for that purpose is a matter peculiarly within the plaintiff's knowledge; and therefore he is bound to show to the court that he has used all reasonable exertions. Here, the principal objection is, that, although a writ of *feri facias* issued, it does not appear what was done under the writ. It may be that the return of

nulla bona was at the instance of the plaintiff himself. The affidavits are not sufficient to satisfy me that all has been done which might have been done, and, consequently, due diligence has not been used. With respect to the case of *Thompson v. The Universal Salvage Company*, 3 Exch. 310,† it may be observed, that it was not objected that the affidavits were insufficient, or probably the rule would have been discharged on that ground." [CRESSWELL, J.—*Nixon v. The Kilkenny and Great Southern and Western Railway Company*, 1 Hurlst. & N. 47,† is more like the present case. There, an application under this act was founded upon affidavits which stated, that a fi. fa. issued against the company and was returned nulla bona, and that the [*118 company had not at the date of the judgment, or since, any lands, chattels, &c., in England, Ireland, or elsewhere, whereon the plaintiff could levy the amount of the judgment, or any part thereof: and it was held sufficient. Pollock, C. B., there distinguishes the case of *King v. The Parental Endowment Assurance Company*, saying,—There, the affidavits stated that a fi. fa. issued, which was returned nulla bona, that the chief office of the company was closed, and that the deponent believed that any writ of execution against the property and effects of the company would be wholly unavailing. But there was no affidavit, as in this case, that the company had no property whatever, real or personal, on which execution could be levied."] The statute authorizes an execution against the shareholder only "if any execution shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution." The court ought to be satisfied that due diligence has been used before the sci. fa. is issued, seeing that the shareholder has no means of raising upon the record the question whether or not they have wisely exercised the discretion given them by the statute. [CRESSWELL, J.—The deponent shows what means he had of becoming acquainted with the position and circumstances of the company, and he distinctly swears that he believes they have no property or effects, and that any execution against them would be ineffectual.] He does not make any independent statement of his belief to that effect, but merely states, that, from the inquiries he has made, he believes it. [CRESSWELL, J.—He shows his means of knowledge.]

V. Williams was not called upon to support his rule.

*PER CURIAM.—We think, upon the authority of *Nixon v. The Kilkenny and Great Southern and Western Railway Company*, [*114 the affidavit is sufficient.

Rule absolute.

April 28. A similar rule had also been obtained against one John Widdecombe, upon a similar affidavit.

W. R. Cole now showed cause, upon an affidavit of Mr. Widdecombe, N. S., VOL. II.—7

stating, that, before the time of recovering the judgment, he, as director and shareholder of the said company, and for and on behalf of the company, had paid out of his own proper moneys for and on behalf of the company, and allowed the said company in account a much larger sum than the amount of the 5*l.* per share alleged in the affidavit upon which the rule was moved not to have been paid up by him on his said shares, and that the company were then and still remained indebted to him in a sum far beyond the said 5*l.* per share alleged not to have been paid up by him, viz. in a sum of 193*l.* 1*s.* 8*d.*, and that the company had no claim whatever on him in respect of the said 5*l.* per share on his said shares on any account whatever; and that, in the manner aforesaid, the whole amount of his said shares had been paid up by him, and that he had and still had a claim on the company beyond the amount of his said shares in the said company to the said amount of 193*l.* 1*s.* 8*d.*, and which he had been and still was unable to obtain from the company.

The 36th section of the 8 & 9 Vict. c. 16, enacts, that, "if any execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to *levy such execution, then such execution may
*115] be issued against any of the shareholders, *to the extent of their shares respectively in the capital of the company not then paid up*: Provided always that no such execution shall issue against any shareholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and upon such motion such court *may* order execution to issue accordingly." The question is, whether the court will, in the exercise of their discretion, allow execution to issue under the circumstances disclosed in Mr. Widdecombe's affidavit. [COCKBURN, C. J.—The judgment-creditor has a *right* to have execution against the shareholder to the extent of his shares not paid up. What answer is it for the shareholder to say, "The company is indebted to me, as well as to you?" The one party has a judgment against the company; the other a mere right of set-off.] The creditor's right is subject to the discretion of the court. [COCKBURN, C. J.—I do not think this is a matter to be discussed upon affidavit. CROWDER, J.—Payment of a call is a clear and definite thing. That which you wish to introduce is open to a great deal of difficulty.] The averments in the scire facias, that the party is a shareholder, and as to the amount of his shares unpaid, are traversable: *Devereux v. The Kilkenney and Great Southern and Western Railway Company*, 20 Law Journ. Exch. 37, 5 Exch. 834.†

V. Williams, contra, was not called upon.

COCKBURN, C. J.—I am of opinion that this rule should be made absolute. The 36th section provides, that, where execution upon a

judgment against a joint stock company proves ineffectual, recourse may be had *by execution, with the leave of the court, against [*116 shareholders to the extent of their shares not paid up. I agree that the court is not a mere instrument to make the order: but I think it is clear that the legislature intended to give an effectual and substantial remedy against the shareholder to the extent of his shares not paid up; and, unless we see that manifest injustice will be done, we are bound to afford the creditor the remedy intended by them. It may be that the shareholder may have some defence upon the *scire facias*: but I see no ground upon which we can at this stage interpose between the creditor and the rights which the law has given him.

The rest of the court concurring,

Rule absolute.

BENNS v. MOSLEY and COBBETT. *May 4.*

The courts have no power to issue writs of habeas corpus to bring up prisoners for the purpose of moving for or showing cause against rules,—there being no writ known to the law which is applicable to such a purpose.

THIS was an ejectionment which was tried before Williams, J., at the first sitting at Westminster in this term, when a verdict was found for the plaintiff.

Mrs. Cobbett, the wife of one of the defendants, moved for a writ of habeas corpus to be directed to the keeper of the Queen's Prison, commanding him to bring up her husband into this court for the purpose of enabling him to move in person for a new trial. [COCKBURN, C. J.—I very much doubt whether we have any power to grant a habeas corpus for such a purpose.] It is in the discretion of the court,^(a) and has repeatedly been granted.

*COCKBURN, C. J.—We have communicated with the judges [*117 of the Courts of Queen's Bench and Exchequer, and we all concur in thinking, that, although a practice had at one time prevailed of granting such applications as the present, that practice was erroneous. Indeed, it is long since those two courts came to the resolution not to grant them. In *Ford v. Nassau*, 9 M. & W. 793,† 1 Dowl. N. S. 681, where an application was made for a writ of habeas corpus to bring up a party in custody under attachments, to enable him to move to set them aside, Parke, B., said: "I am not aware of any precedent for such an application. In *The Attorney-General v. Hunt*, 9 Price, 147, this court refused to grant a habeas corpus to enable a defendant in an information who was confined in a county gaol, under sentence of another court, for libel, to attend in court at Westminster, and conduct his

(a) See *Clark v. Smith*, 3 C. B. 264 (E. C. L. R. vol. 54), and *Ford v. Graham*, 10 C. B. 269 (E. C. L. R. vol. 70).

defence in person ; and, in *Rex v. Parkyns*, 3 B. & A d. 679 (E. C. L. R. vol. 5), the Court of King's Bench refused a similar application, where the object was to show cause against a rule for a criminal information : " and he directed the counsel to look into the authorities, and apply again. On a subsequent day, the counsel having referred to a case of *The Attorney-General v. Cleave*, 2 Dowl. P. C. 668, where the Court of Exchequer had granted a writ of habeas corpus to bring the defendant into court for the purpose of enabling him to defend an information filed against him for selling unstamped papers, the learned Baron said,—“ The difficulty is, to see in what form the writ is to be. A writ of habeas corpus is issued for some specified purpose, either ad testificandum, or ad respondendum, as the case may be. There is no general form for a writ of habeas corpus : and, as there is no authority for doing this, we cannot grant the application.” It is plain, therefore, that we have no power to do that which is asked.

Writ refused.

*118] *In the Matter of the Acknowledgment of ESTHER, the Wife of WILLIAM ANDERSON. May 1.*

Upon a motion for an order to enable a married woman to execute a conveyance without her husband's concurrence, under the 3 & 4 W. 4, c. 74, s. 91, the court declined to receive an affidavit in which she was described as “ wife or widow of W. A.”

J. ADDISON moved for an order under the 3 & 4 W. 4, c. 74, to enable Esther Anderson by deed or surrender to convey certain premises to which she was separately entitled, without the concurrence of her husband.

The affidavit was sufficient in all respects, save that the deponent described herself as “ the wife or widow of William Anderson, late of Leeds, in the county of York.”

CRESWELL, J.—The description of the deponent will not do. If she is a widow, she does not need the assistance of the statute. We have already on more occasions than one decided that such a description will not do : see *In re Mary Noy*, 7 Scott, N. R. 434, and *Ex parte Lydia Sparrow*, 12 C. B. 334 (E. C. L. R. vol. 74). The affidavit must be amended, and re-sworn.

An amended affidavit having been produced, the rule was granted.

Fiat.

*SWEET, Appellant, SEAGER, Respondent. *May 4.* [*119

A. held premises under a building lease, with a covenant to pay, bear, and discharge "all such parliamentary, parochial, and county, district, and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burthens, duties, and services whatsoever as during the term should be taxed, assessed, or imposed upon or in respect of the premises, or any part thereof." He granted an underlease (at a rack-rent) to B., the latter covenanting "that the several covenants, conditions, and agreements contained in the original lease on the lessee's part to be performed and observed (except the covenants to pay rent and to insure), should during the continuance of the demise be performed and observed by him."—

Held, that B. was liable for the expense of drainage works done upon the premises under the authority of the Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120.

THIS was an appeal against a decision of the judge of the county court of Kent holden at Greenwich, in an action of replevin in which the defendant (the respondent) avowed for 22*l.* 10*s.*, a quarter's rent due to him from the plaintiff (the appellant) at Christmas, 1856. The following case was stated (and settled by the judge) for the opinion of this court :—

By an indenture of lease made the 27th of November, 1829, between Michael Raven, of the first part, Catherine Vaughan Austin, of the second part, and the defendant (William Seager), of the third part,—it is witnessed, that, in consideration of the expense which the said W. Seager had been at in erecting the messuage and buildings thereafter demised, and also of the rents and covenants thereafter reserved and contained, the said M. Raven demised and leased, and the said C. V. Austin demised, leased, and confirmed, a piece of ground situate in the parish of Charlton, in the county of Kent, therein described, with the said messuage and buildings, unto the said W. Seager, his executors, administrators, and assigns, from the 29th of September then last for the term of 59½ years, wanting fifteen days, yielding and paying therefor the yearly rent of 20*l.*, *without any deduction whatsoever in respect of any taxes, rates, assessments, impositions, or any other matter or thing whatsoever then already or thereafter to be taxed, assessed, and imposed upon or in respect of the said premises, or any part thereof, by authority of *parliament or* [*120 *otherwise howsoever* : And the said indenture of lease contained a covenant by the said W. Seager that he, his executors, administrators, and assigns, would quarterly during the said term pay unto the said M. Raven, his executors, administrators, and assigns, the said quarterly rent of 20*l.* on the several days and times thereinbefore appointed for payment thereof, without any deduction, according to the reservation thereof therein contained, and would in like manner pay, bear, and discharge *all such parliamentary, parochial, and county, district, and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burthens, duties, and services whatsoever, as during the said term should be taxed, assessed, or imposed upon or in respect of the said premises thereby demised, or any part thereof, and would during the*

said term insure and keep insured the said messuage and buildings from loss or damage by fire, for the sum of 1000*l.*, for a term not less than seven years.

By an indenture of underlease made on the 17th of February, 1846, between the defendant, W. Seager, of the one part, and the plaintiff, G. Sweet, of the other part, after reciting the above-stated lease, the defendant demised the said piece of land, messuage, buildings, and premises comprised in the above-stated lease, to the plaintiff, his executors, administrators, and assigns, from the 25th of December, 1845, for all the residue of the said term of 59½ years (wanting fifteen days), except the last day of the said term, at the rent of 85*l.* for the first year of the said term, and the yearly rent of 90*l.* for the second and subsequent years of the said term, payable quarterly, and a proportional part at the expiration of the term: and by the same indenture of underlease the plaintiff covenanted with the defendant that the rent thereby reserved should be paid at the times aforesaid, *121] *and that the several covenants, conditions, and *agreements contained in the above-recited indenture of lease on the lessee's part to be performed and observed (except the covenant to pay the rent thereby reserved, and the covenant to keep the said premises insured from fire) should during the continuance of that demise be performed and observed by the plaintiff, his executors, administrators, or assigns: And by the same indenture of lease it is provided that the plaintiff, his executors, administrators, or assigns, might make void that demise, and the term thereby granted, at the expiration of the first three, seven, fourteen, or twenty-one years thereof, by giving to the defendant, his executors, administrators, or assigns, six months' notice in writing to that effect, or at any time while the said messuage and premises, or any part thereof, should be untenable by reason of damage from fire, having continued so untenable for nine calendar months, by giving one week's notice in writing to that effect.*

No such notice has been given.

By the Metropolitan Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 31, and sched. B., part 2, the parish of Charlton and other districts are united into a district called "The Plumstead District," and placed under the management of a board of works for the purposes of the act.

By s. 73 of the said act, the district board of works is empowered to require *the owner* of any house, whether built before or after the commencement of the act, situate within one hundred feet of a sewer of sufficient size on a lower level, and found not to be drained by a sufficient drain communicating with some sewer, to make a drain, with proper branches, from the house to the sewer, with such other works as may appear requisite to the board or their officers; and, if the owner of such house or building neglect or refuse so to do, the district board

of works is authorized to cause the same to be *constructed and made, and to recover the expenses incurred thereby from such [*122 owner, in manner hereinafter provided.

By s. 217 of the act it is enacted that it shall be lawful for any vestry or district board to require the payment of any costs or expenses which the owner of any premises may be liable to pay under the act, from any person who then or at any time thereafter occupies such premises; and the owner shall allow every such occupier to deduct all sums of money which he so pays, or which are levied by distress, out of the rent from time to time becoming due in respect of the said premises, as if the same had been actually paid to such owner as part of such rent.

By s. 219 of the said act it is enacted that nothing therein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property whereof it is or may be agreed that the occupier shall pay and discharge all *rates, dues, and sums of money payable in respect of such house*, building, or other property, or to affect any contract whatever between landlord and tenant.

By s. 250 it is enacted, that, in the construction of the act, the word "owner" shall (except for a purpose not material to this case) mean the person for the time being receiving the rack-rent of the land or premises in respect of which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such land or premises were let at a rack-rent. The act contains other provisions which it might be material to refer to.

The house comprised in the stated lease and underlease is within one hundred feet of a public sewer of sufficient size on a lower level, and, until the execution of the works hereinafter mentioned, was not sufficiently drained into any sewer.

Some time in the month of June, 1856, a good and *sufficient [*123 notice under the said act, by the surveyor to the said board of works, addressed to the plaintiff (the appellant) as owner and occupier of the said house, was left at the said house, requiring him to execute certain drainage works therein specified from the said house into the said sewer, being works authorized by the said act to be done, and giving him notice, that, if the works were not performed, the said board would cause them to be done, and recover the expenses according to the said statute.

Other notices under the said act, to the same effect, were left at the said house in the month of September, 1856. All the said notices were sent by the plaintiff to the defendant shortly after they were so left at the said house, and before the works hereinafter mentioned were commenced.

The drainage works required by the said notices to be constructed were not done by the plaintiff or by the defendant, but were afterwards

executed by a person employed by the said board of works, under the inspection of their surveyor, in the middle of October, 1856; and, on the 16th of December, 1856, the plaintiff was required by the said board to pay, and did pay to the said board, the sum of 27*l.* 16*s.* 8*d.*, being the amount of the expenses paid by the board for the said works.

On the 25th of December, 1856, the sum of 22*l.* 10*s.* became due from the plaintiff to the defendant, for a quarter's rent for the said house and premises, reserved by the said underlease. The plaintiff claimed to retain the said sum of 22*l.* 10*s.* in part satisfaction of the said sum of 27*l.* 16*s.* 8*d.* paid to the said board of works.

On the 22d of January, 1857, the defendant distrained the goods of the plaintiff on the said demised premises for the said sum of 22*l.* 10*s.*; and on the same day this action of replevin was brought in the county court by the plaintiff for such distress.

*124] On the 26th of February, 1857, the cause was tried *before the judge of the county court, and adjourned until the 12th of March, 1857, on which latter day the said judge gave judgment for the defendant, on the ground that the plaintiff, by the terms of his lease, was bound to bear and discharge the costs of executing the said drainage works, and was not entitled to deduct the amount from the rent reserved to the defendant.

The question for the opinion of the court, was, whether the plaintiff was entitled to deduct the said sum of 27*l.* 16*s.* 8*d.* from the rent reserved by the said underlease to the defendant. If the court should be of opinion that the plaintiff was entitled to make the said deduction, then the judgment for the defendant was to be set aside, and judgment given for the plaintiff, with 40*s.* damages, or a new trial granted: otherwise, the said judgment for the defendant was to stand.

Milward, for the appellant.(a)—The defendant is the person who answers the description of "owner" given by the interpretation clause, s. 250,—the person receiving the rack-rent. [*M. Chambers*, Q. C., assented.] Then, as such owner, he is the person upon whom is by s. 78 cast the duty of making the drain communicating with the sewer. That section enacts, that, "if any house or building, whether built before or after the commencement of this act, situate within any such *125] parish or *district, be found not to be drained by a sufficient drain communicating with some sewer, and emptying itself into the same, to the satisfaction of the vestry or board of such parish or district, and if a sewer of sufficient size be within one hundred feet of

(a) The points marked for argument on the part of the appellant, were,—

"That he was entitled to deduct the expense of the drainage works in question from the rent due to the defendant; that the defendant was owner of the premises within the 217th and 250th sections of the Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120; and that the expense of the drainage works in question was not such a levy, rate, assessment, tax, charge, imposition, contribution burthen, duty, or service, as the plaintiff by his covenant was bound to pay, bear, or discharge."

any part of such house or building, on a lower level than such house or building, it shall be lawful for the vestry or board, at their discretion, by notice in writing, to require *the owner* of such house or building forthwith, or within such reasonable time as may be appointed by the vestry or board, to construct and make from such house or building into any such sewer a covered drain, and such branches thereto, of such materials, of such size, at such level, and with such fall as shall be adequate for the drainage of such house or building, and its several floors or stories, and also of its areas, water-closets, privies, and offices (if any), and for conveying the soil, drainage, and wash therefrom into the said sewer, and to provide fit and proper paved or impermeable sloped surfaces for conveying surface water thereto, and fit and proper sinks, and fit and proper syphoned or otherwise trapped inlets and outlets for hindering stench therefrom, and fit and proper water supply and water-supplying pipes, cisterns, and apparatus for scouring the same, and for causing the same to convey away the soil, and fit and proper sand traps, expanding inlets, and other apparatus for hindering the entry of improper substances therein, and all other such fit and proper works and arrangements as may appear to the vestry or board, or to their officers, requisite to secure the safe and proper working of the said drain, and to prevent the same from obstructing or otherwise injuring or impeding the action of the sewer to which it leads; and it shall be lawful for the said vestry or board to cause the said works to be inspected while in progress, and from time to time during their execution to order such reasonable alterations therein, *additions [*126 thereto, and abandonment of part or parts thereof, as may to the vestry or board or their officers appear, on the fuller knowledge afforded by the opening of the ground, requisite to secure the complete and perfect working of such works; and, if *the owner* of such house or building neglect or refuse, during twenty-eight days after the said notice has been delivered to such owner, or left at such house or building, to begin to construct such drain and other works aforesaid, or any of them, or thereafter fail to carry them on and complete them with all reasonable despatch, it shall be lawful for the vestry or board to cause the same to be constructed and made, and to recover the expenses to be incurred thereby from *the owner* in the manner hereinafter provided." The mode of recovering the expenses is pointed out by s. 217, viz. by distress on the occupier, to be reimbursed out of the rent. In the absence of any special provision, the owner would be the person liable to pay. And, suppose the owner here had paid the money, he would have had no claim over against any other person. Then comes s. 219, which provides that "nothing in the act contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property whereof it is or may be agreed that the occupier shall pay and discharge all rates, dues, and

sums of money payable in respect of such house, building, or other property, or to affect any contract whatsoever between landlord and tenant." That probably was a provision that was hardly necessary. We must see what was the bargain between the parties. It is clear that this is not a burthen which the act of parliament throws upon the ground-landlord. *Primâ facie*, therefore, it is imposed upon the defendant, as being the owner of the rack-rent. [CRESSWELL, J.—This would be a charge which the defendant would have been bound to pay if the premises were not let. Has not the plaintiff *covenanted to do *127] all (with the exception mentioned in the underlease) that the defendant had covenanted to do?] It is rather a covenant of indemnity, than a covenant to do all acts which the covenantee had undertaken to do. This is not a rate or an assessment, or a charge or parochial levy or service. [COCKBURN, C. J.—Is it not a duty? CROWDER, J.—Or a burthen?] It is not one of those periodical or occasional duties, assessments, or burthens which the covenant contemplated: it is a claim for a specific sum of money, wholly distinct from the sewer rate. It is a payment in respect of an improvement to the premises. [CRESSWELL, J.—But for the 217th section, the tenant could not deduct the money at all. Then, s. 219 declares that nothing in the act contained shall affect any contract by the occupier to pay and discharge all rates, dues, and sums of money payable in respect of the property. Has the plaintiff covenanted to pay all rates, dues, and sums of money payable in respect of the property?] But for s. 217, the occupier could not be called upon to pay in the first instance. Clauses of this sort are to be construed *ejusdem generis*. In *Southall v. Leadbetter*, 8 T. R. 458, a lessee for twenty-one years at a peppercorn rent for the first half year, and a rack-rent for the rest of the term, who by agreement was to put the premises in repair, and who covenanted to pay the land-tax and all other taxes, rates, assessments, and *impositions*, having assigned his term for a small sum in gross, was held not to be liable to pay the expense of a party-wall, either by the provisions of the statute 14 G. 3, c. 78, s. 41, or the covenant; the charge in such case must be borne by the original landlord. Lord Kenyon there says: "The covenant to pay the land-tax and all other taxes, rates, assessments, and *impositions*, only extends to the land-tax and other taxes *ejusdem generis*: but this is not a tax." So, in *Beardmore v. Fox*, 8 T. R. *128] 214, it was held that the lessor of a house at rack-rent *(there being no other person entitled to any kind of rent) was liable to contribute to the expenses of a party-wall under the 14 G. 3, c. 78, though the lessee had improved the house demised. In *Barrett v. The Duke of Bedford*, 8 T. R. 602, there were clear and unambiguous words casting the burthen upon the tenant. *Waller v. Andrews*, 3 M. & W. 312,† and *Payne v. Burridge*, 12 M. & W. 727,† which will probably be relied on by the defendant, are distinguishable, inasmuch as

there the payments were made in respect of a charge affecting a whole district.

Montagu Chambers, Q. C. (with whom was *J. Brown*), contrà.(a)—The payment in question was properly chargeable on the tenant, and not upon the landlord. It is impossible to conceive a covenant in terms more strong to show that it was intended that the landlord should be relieved from every burthen or duty which might be imposed upon the premises or upon the land. The tenant covenants to pay not only all taxes which are usually called tenants' taxes, but also all those burthens that usually fall upon the landlord. The words are,—“And shall and will in like manner pay, bear, and discharge all such parliamentary, parochial, and county, district, and *occasional levies*, rates, assessments, taxes, *charges, impositions, contributions, burthens, duties, and services* whatsoever, as during the said term shall *be taxed and assessed, [*129 or imposed upon or in respect of the said premises hereby demised.” This clearly is a burthen imposed upon or in respect of the premises,—a duty that arises in respect of them, from which it clearly was intended that the landlord should be relieved. *Southall v. Leadbetter* and *Beardmore v. Fox* are altogether inapplicable. In the former, the contention was whether or not there was an *improved rent* acquired by the lessor; and it was held that there was not. Lord Kenyon said: “The *improved rent* mentioned in this act of parliament stands contradistinguished from *some other rent*; but here no other rent was reserved but that at the granting of the lease. But it is said that the lessee received from the assignee *a sum in gross* as the consideration for the purchase, which is equivalent to an *improved rent*. If, indeed, a large sum were paid to [for] the purchase of a lease, though no improved rent were reserved to the original lessee, I think he would be liable to pay this expense within the act of parliament. But that is not the present case; for, when Winter granted this lease, he reserved the best rent which could be procured for it at that time, since this rent exceeds the rent formerly reserved by 10*l.* per annum and the whole of the land-tax; and the case ought not to be varied by the circumstance of the estate's gradually increasing in a small degree.” If the intention of the parties at the time of entering into the contract is to be looked at, can there be a doubt as to what these parties meant in 1846? *Waller v. Andrews*, 3 M. & W. 312,† and *Payne v. Burrige*, 12 M. & W. 727,† are precisely in point. In the former, by a memorandum of agreement, certain marsh lands were demised by the plaintiff to the

(a) The points marked for argument on the part of the defendant, were,—

“That the plaintiff was not entitled to deduct the expense of the drainage works in question from the rent due to the defendant; that, by the covenants in the underlease to the plaintiff, he was bound to bear and pay the expense of the said drainage works himself; and that the said expenses were a charge, duty, or imposition imposed by authority of parliament upon or in respect of the demised premises within the meaning of the lease of the 27th of November, 1829, and therefore within the covenant which the plaintiff took on himself by the underlease.”

defendant, subject to a condition that the defendant should pay all outgoings whatsoever, rates, taxes, *scots*, &c., whether parochial or *130] parliamentary, which then were or should thereafter be *charged or chargeable upon or on account of the said marsh lands (the then present land-tax only excepted): and it was held, that an extraordinary assessment made by commissioners of sewers upon the lands, for a work of permanent benefit to the land, was within the meaning of the agreement. Parke, B., says: "The first question in this case, was, whether a sewer's rate on the landlord, in respect of the permanent improvement of the land by a new sluice, falls within the terms of the agreement. We think it does; for, though the authority of Lord Holt raises a doubt whether this could be properly considered as a *parliamentary tax*, and therefore, if the words 'parliamentary taxes' only had been mentioned, it might have been questionable whether the sewer's rate was included, yet, when such very extensive words as those in the agreement are used, that is, 'all outgoings, rates, and scots,' which last word is *commonly* applied to sewer's rates *on marsh lands*, we think that the sewer's rate is included. It is a 'scot,' and would be comprised in the terms 'all *parliamentary scots*, though not perhaps properly and technically so, as not being imposed *directly* by parliament, but by commissioners deriving their authorities under an act of parliament." So, in *Payne v. Burrigge*, where, by a local act, the commissioners appointed thereby were authorized to pave and flag footways, and the costs thereof were to be paid by the tenants or occupiers of the houses next adjoining; in default whereof they were to be recovered by distress: another clause empowered the tenant to deduct the costs so paid by him out of his rent: and it was held that this charge was within the terms of a covenant in a lease subsequently made, whereby the tenant covenanted to pay all taxes, rates, duties, levies, assessments, and payments whatever, which were, or during the term might be, rated, levied, assessed, or imposed on the premises. [CRESSWELL, J.—The *131] way in which it was *sought to distinguish those cases, was, by saying that this is not an apportionment or subdivision of a charge imposed upon a district, but a specific sum charged for the improvement of a single house.] It is not the less on that account a parliamentary or district tax. In *Hurst v. Hurst*, 4 Exch. 571,† words like these were extended as well to a landlord's tax as to a tenant's. There, a lessee covenanted that he would pay "all taxes, charges, rates, tithes, or rent-charge in lieu of tithe, dues, and duties whatsoever, as then were or should at any time thereafter during that demise be taxed, charged, assessed, or imposed *upon the said demised premises*:" and it was held that the covenant was not confined to rates payable by the landlord, but meant all rates then imposed on the lessee in respect of his occupation, and all future rates which might be imposed on the land itself. This is an improvement of which the tenant has all the

benefit. The landlord has only a reversion of three days reserved to him.

Milward, in reply.—This is not a payment of money in respect of an assessment or charge upon the demised premises: it is a mere substitution for the obligation to do certain specific work, which the act of parliament in the first instance imposes on the owner. The burthen of showing that it comes within the covenant rests upon the defendant.

COCKBURN, C. J.—I am of opinion that the decision of the county court judge was right, and that this appeal must be dismissed. The 73d section of the Metropolis Local Management Act, 1855, enables the district board of works to order works of the description of that in question to be done by “the owner” of the premises, and provides, that, in case he shall neglect or refuse to do it, the district board may cause the same to *be done, and may recover the expenses thereby [*132 incurred from the owner, in manner thereafter provided. But, as the premises are not always in the occupation of the owner, there is a provision in s. 217 enabling the district board to enforce payment from the occupier, who may indemnify himself by deducting all moneys so paid by him from the rent from time to time becoming due in respect of the premises. And by another section (s. 219) it is provided that nothing therein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property whereby it is or may be agreed that the occupier shall pay and discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatever between landlord and tenant. *Primâ facie*, therefore, this is a charge upon the owner,—the person entitled to the rack-rent,—but payable by the occupier. The lease under which Seager holds the premises contains an express covenant on the lessee’s part to “pay, bear, and discharge all such parliamentary, parochial, and county, district, and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burthens, duties, and services whatsoever as during the said term should be taxed, assessed, or imposed upon or in respect of the said premises thereby demised, or any part thereof.” That covenant is incorporated in the underlease granted in 1846 by Seager to Sweet, the latter covenanting, amongst other things, “that the several covenants, conditions, and agreements contained in the above-recited indenture of lease on the lessee’s part to be performed and observed (except the covenant to pay the rent thereby reserved, and the covenant to keep the said premises insured from fire), should, during the continuance of that demise, be performed and observed by the lessee (Sweet), his executors, administrators, or assigns.” The *question is, [*133 whether this charge comes within the very large and comprehensive words of the covenant. It clearly was the intention of the original landlord, and also of Seager, that the tenant should bear the

landlord harmless against all charges of a general local character imposed upon or in respect of the premises. The words used are very large, and quite large enough, in my opinion, to include the duty or imposition in question. As to the supposed distinction between ordinary rates and occasional particular assessments for permanent improvements, it is to be observed that the same suggestion was made in *Payne v. Burrridge*, 12 M. & W. 727,† and the Court of Exchequer held, that, although the charge was in respect of a permanent improvement to the premises, it fell within the terms of a covenant in a lease subsequently made, whereby the tenant covenanted to bear and pay all taxes, rates, duties, levies, assessments, and payments whatsoever which were, or during the term might be, rated, levied, assessed, or imposed on the premises,—words even less comprehensive than those of the covenant in the present case.

CRESSWELL, J.—I entirely agree with my Lord in thinking that the decision of the judge of the county court was right. Some taxes are properly called landlords' taxes. But I think it is impossible to read the covenant which is incorporated by reference into the lease under which the appellant holds the premises, without seeing that it was the intention of the parties that the lessor should receive a certain sum wholly independent of any taxes or assessments of any description or upon any account. It seems to me that the arguments urged on behalf of the appellant are completely answered by the case of *Payne v. Burrridge*.

*134] CROWDER, J.—I am of the same opinion. The *covenant in question is in the most general and comprehensive terms, and clearly embraces this charge. The case of *Payne v. Burrridge* is conclusive so far as regards the argument as to permanent improvements.

WILLES, J.—I also think, for the reasons assigned, that this appeal must be dismissed, and, I apprehend, dismissed with costs.

Appeal dismissed, with costs.

GILKISON and Another v. MIDDLETON and Others. April 28.

By a memorandum of charter, made at Liverpool, it was agreed that the ship should load a cargo there, and proceed to China, and there deliver the same agreeably to bills of lading, and afterwards load a full cargo of tea or other lawful merchandise for Liverpool or London, and deliver the same to the charterers or their assigns, they paying freight for the same at the rate of 7*l*. 18*s*. per ton of 50 cubic feet for tea delivered, *for the round out and home*; other goods, if shipped, to pay in customary proportion: in consideration whereof, *the outward cargo to be carried freight-free*: payment to become due and to be made as follows,—800*l*. on sailing, by charterers' acceptance at three months' date, and the balance on the unloading and delivery of the cargo, by approved bills on London at two months' date, or cash: "*the master to sign bills of lading at such rates of freight as may be required by the agents of the charterers, without prejudice to this charter-party; and the owners to have an absolute lien upon the cargo for the recovery of all freight, dead-freight, demurrage, &c., due the ship under this charter-party.*"

By another memorandum, endorsed on the above, Singapore was substituted for China: and it was agreed, that, on delivery of the cargo in Singapore, the freighters' agents there should have the option of loading the ship for London or Liverpool, or for China; that, in the event of the vessel returning from Singapore, the freight for the round should be 3375*l*. in full; that, should the vessel proceed to China, the freighters should pay an additional freight of 30*s*. per ton on the homeward cargo from thence, for the privilege of carrying intermediate freight from Singapore to China; and an acceptance at three months for 900*l*., on the ship's sailing from Liverpool, was substituted for 800*l*.

The ship was laden by the charterers chiefly as a general ship; but they shipped on *their own account* goods for which the master signed bills of lading making the goods deliverable at Singapore to M. & Co., or assigns, paying freight as per margin: in the margin, the freight (in the aggregate, 196*l*. 12*s*.) was declared to be "payable in Liverpool one month after sailing of vessel, lost or not lost."

The vessel sailed from Liverpool on the 21st of February, 1856, and the charterers gave their acceptance at three months for 900*l*., which became due on the 23d of May, and was dishonoured:—

Held, that the owners had a lien upon the goods so shipped by the charterers, for the amount of the bill of lading freight, as against the consignees (M. & Co.), who had advanced money to the consignors upon the shipment; but not for the 900*l*.

THE following case was stated for the opinion of this court, without pleadings, by consent of the parties, and by judge's order.

*The plaintiffs are shipowners, and are the owners of the ship [*185 James Scott, of Port Glasgow.

The defendants are merchants in Singapore, where they carry on business under the firm of Middleton & Co.; and they have also a house in Liverpool, which trades under the firm of C. S. Middleton & Son.

On the 24th of December, 1855, the plaintiffs chartered the James Scott to the firm of Syers, Walker & Syers, merchants, of Liverpool, for a voyage from Liverpool to Hong Kong or Shanghai as ordered before sailing, and to return to Liverpool or London, at certain rates of freight therein mentioned.

The following is a copy of the charter-party:—

"Liverpool, 24th Dec., 1855.

"It is this day mutually agreed between Messrs. Newall, Burt & Co., agents for owners of the good ship or vessel called the James Scott, A. 1. 12, and newly coppered, of, &c., of the burthen of 340 tons register measurement or thereabouts, whereof — is master, now in Liverpool, and Messrs. Syers, Walker & Syers, of Liverpool, mer-

chants, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed load in Prince's or Salthouse Dock a full and complete cargo of lawful merchandise, not exceeding 400 tons in weight, and therewith proceed to Hong Kong or Shanghai, as ordered before sailing, or so near thereunto as she may safely get, and there deliver the same agreeably to bills of lading; after which, she shall load there, or, if required, proceed to one other safe port in China, and there load in the usual and customary manner from the agents of the said charterers a full and complete cargo of tea or other lawful merchandise,—the cargoes being brought and taken from alongside the vessel at charterers' risk and expense: ship is to have liberty to put on board 80 tons kentledge, copper-dross, or *136] other equally dead weight, and to retain *it on board during the voyage, which the said merchants bind themselves to ship,—not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and, being so loaded, shall therewith proceed to Liverpool or London, as ordered on signing bills of lading abroad, or so near thereunto as she may safely get, and there deliver the same in the usual and customary manner to the said charterers or their assigns, *they paying freight for the same at the rate of 7l. 10s. sterling per ton of 50 cubic feet for tea delivered, for the round out and home: a reduction of 5s. per ton to be made if ship be discharged and loaded at Hong Kong: other goods, if shipped, to pay in customary proportion: in consideration whereof, the outward cargo to be carried freight free: payment whereof to become due and to be made as follows,—800l. on sailing, by charterers' acceptance at three months' date: what money the master may require for the ordinary disbursements of the vessel at her port of discharge and loading abroad, free of interest, paying 2½ per cent. commission, subject to insurance, at the current rate of exchange; and the balance on the unloading and right delivery of the cargo by good and approved bills on London at two months' date, or cash equal thereto. Thirty running days (Sundays excepted) are to be allowed the said merchant, if the ship is not sooner despatched, for loading, in Liverpool, and forty-five like days for all purposes abroad, and ten days on demurrage over and above the said laying days and time herein stated at 10l. sterling per day, paying day by day as the same shall become due. The time occupied in changing ports not to count as laying days. Should it be necessary for the vessel to take in dunnage or ballast, the same to be provided by the owners. The master to sign bills of lading at such rates of freight as may be* *137] *required by the agents of the charterers, without *prejudice to this charter-party; and the owners to have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurrage, &c. due the ship under this charter-party. The act of God, the Queen's enemies, fire, strike of pitmen, and all other dangers and accidents of*

the seas, rivers, and navigation, of what nature and kind soever throughout this voyage being excepted. It is agreed that the charterers are to have the option of naming the lumpers and stevedores who are to take in and stow the outward cargo; and the ship is to pay the charterers for so doing one shilling per ton; but it is expressly agreed that the cargo shall be stowed under the direction of the master, and the owners of the vessel responsible for improper stowage.

"The vessel to be consigned to the charterers' agents abroad, free of commission.

"On the return of the ship to Liverpool, she shall be addressed to Newall, Burt & Co., brokers, or to their agents at any other port of discharge. Penalty for non-performance of this agreement, the estimated amount of freight.

"For the owners,

"NEWALL, BURT & Co.

"SYERS, WALKER & SYERS."

It was afterwards agreed between the plaintiffs and Messrs. Syers, Walker & Co., that the destination of the vessel should be changed to Singapore, and thence either home or by way of China: and the following endorsement was thereupon made upon the charter-party:—

"Liverpool, 7th Feb., 1856.

"It is this day mutually agreed that the following alterations shall be made in the within charter, viz. that freighters shall load the James Scott for Singapore, in lieu of China.

"That, on delivery of cargo in Singapore, the freighters' agents there shall have the option of loading the *vessel for London or [*138 Liverpool, or for Hong Kong or Shanghai. In the event of the vessel returning from Singapore, the freight for the round to be 3875*l.* in full. The ballast to be discharged in Singapore, freighters agreeing to pay any loss or expense on said ballast.

"Should the vessel proceed to China, the freighters to pay an additional freight of 30*s.* per ton on homeward cargo from thence, for the privilege of carrying intermediate freight from Singapore to China. The terms of payment to be altered as follows,—900*l.* instead of 800*l.* to be paid on sailing hence, by charterers' acceptance at three months' date.

"Should the vessel load from Singapore to China, the sum of 750*l.* to be paid to the captain there, and in China say the amount of freight payable in Singapore by bills of lading to be received by the captain, and the balance on delivery of cargo in China, both at current rate of exchange.

"The freighters to be allowed seventy running days for loading here and discharging and loading in Singapore, if the vessel return direct, and ninety-six running days for all purposes of loading and discharging here and abroad if she proceeds to China. The vessel to retain her

ballast on board if she proceeds to China; and the homeward cargo thence to consist entirely of measurement.

"All other terms and conditions of the within charter to remain in force.

NEWALL, BURT & Co.

SYERS, WALKER & SYERS."

The vessel was laden by Messrs. Syers, Walker & Syers, chiefly as a general ship, but they shipped on board of her, *on their own account*,—825 barrels of ale and porter, 100 ditto pitch, 25 ditto tar, and 120 *139] bales merchandise, which goods they *consigned to the *defendants' house at Singapore for sale on their* (Syers, Walker & Syers') *account*.

The master of the vessel signed bills of lading for these goods as follows:—

S. 1/200 .	200 barrels ale	
SWS.	50 "	"
S. 200/275.	75 "	porter
Meas ^{ts}	2252 ^h	1 ^h :
@ 30/.	£84	9 1
5 ⁰ / ₁₀	4	4 6
	£88	13 7

"Not accountable for leakage or breakage, except from improper stowage."

"Freight payable in Liverpool one month after sailing of vessel, lost or not lost.

Weight and contents unknown."

"Shipped in good order and well conditioned, by Syers, Walker & Syers, in and upon the good ship James Scott, whereof is master for this present voyage Putt, and now riding at anchor in the port of Liverpool, and bound for Singapore,—

"Two hundred and fifty barrels bottled ale.

"Seventy-five barrels bottled porter, being marked and numbered as in the margin, and are to be delivered in the like good order and well-conditioned at the aforesaid port of Singapore, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever excepted, save risk of boats so far as ships are liable thereto, unto Messrs. Middleton & Co., or their assigns, paying freight for the said goods here as per margin: 5 per cent. primage, and average accustomed.

"In witness whereof, the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void. Dated in Liverpool, 18th February, 1856.

"FRANK PUTT."

There were two other bills of lading of the same date, and in similar terms,—one for 120 bales of merchandise, and the other for 100 barrels coal pitch, and 25 barrels Stockholm tar. The freight mentioned *140] in the margin of **the former is 65l. 14s. 10d., and in the margin of the latter, 42l. 8s. 7d.*

These three bills of lading, with invoices of the goods shipped, were handed by Syers, Walker & Syers, to C. S. Middleton & Son on the 20th of February, 1856, who thereupon in exchange for the same, pursuant to previous arrangement, accepted Syers, Walker & Syers's draft for 2189l., being 80 per cent. on the invoice amount of the goods so shipped, as an advance on the consignment.

This draft (which was dated on the 20th of February, 1856, and was

payable four months after date, and was duly paid at maturity), was accepted by C. S. Middleton & Son on the 21st of February, 1856. The bills of lading were transmitted by C. S. Middleton & Son to the defendants, Middleton & Co.

The invoice amount upon which 80 per cent. was advanced by the defendants as above mentioned, included the freight mentioned in the bills of lading.

It is a very usual practice in Liverpool for freights reserved under bills of lading to Singapore, to be made payable in Liverpool one month after the ship's sailing.

The vessel sailed from Liverpool for Singapore on the 21st of February, 1856; and thereupon, in conformity with the terms of the charter-party, the plaintiffs drew a bill of exchange upon Syers, Walker & Syers, for 900*l*. This bill (which was dated the 20th of February, 1856, and was made payable three months after date), was accepted by Syers, Walker & Syers on the 21st of February, 1856. It fell due on the 23d of May, 1856, and was dishonoured: and it is still in the plaintiffs' hands wholly unpaid. Messrs. Syers, Walker & Syers stopped payment early in April, 1856.

The vessel arrived out at Singapore on the 13th of June, 1856; and the master, having received advices from the plaintiffs of the stoppage of the charterers, and that he was to insist upon a lien upon their goods, refused to *deliver the goods so shipped by them as aforesaid to the defendants, who claimed them under the said bills of lading, [*141 unless they paid the amount of the said bill of exchange for 900*l*. for which the plaintiffs claimed a lien on the goods.

The defendants refused to acknowledge the lien, and claimed delivery of the goods under the bills of lading. The master of the vessel thereupon wrote to them a letter, of which the following is a copy:—

“Messrs. Middleton & Co.

“Singapore, 17th June, 1856.

“Dear Sirs,—With reference to the goods shipped by Messrs. Syers, Walker & Syers, on board the *James Scott*, marked and numbered as under noted, and on which I maintain that the owners of that vessel have a lien for the amount of freight due on a voyage from Liverpool to this port as per charter entered into with the said shippers, I regret that you should have refused to grant a letter submitting the dispute in reference to the said lien to the decision by law or otherwise as might appear most advantageous to our respective friends in England.

“Being anxious to avoid litigation here, I would now propose that you pay over the amount in dispute, say 900*l*., to any third party which we may mutually agree upon, to be by them held until it is decided, by appeal to law in England whether the ship is justly and legally entitled to the said or any other amount. On your doing this the goods

will be at once delivered up to you; otherwise, the only course left open to me, is, to hold them until the claim is settled.

"An early reply to this will oblige your obedient servant,

"FRANK PUTT, Master of

"the barque James Scott."

The defendants for some time persisted in their refusal to acknowledge the lien in any way; but eventually they *agreed that the goods
*142] should be delivered without prejudice to the lien (if any did exist, which they denied); and they gave the master a letter, of which the following is a copy:—

"To Capt. Frank Putt, of the barque James Scott.

"Singapore, 21st June, 1856.

"Sir,—In consideration of your delivering to us the following goods [setting forth the description, marks, and numbers,] shipped to us by Messrs. Syers, Walker & Syers, we hereby agree that your doing so shall not prejudice the lien which you allege the owners of the James Scott have on such goods, but which we deny; and we agree that the question of lien on such goods shall be determined between the owners of the James Scott and our house in Liverpool according as the law of England may direct; and our said house shall pay the amount, if any, for which the owners are legally entitled to a lien.

(Signed) "MIDDLETONS & Co."

The master, on receiving this letter, delivered the goods to the defendants.

The charterers failed to load the ship home; and the plaintiffs in consequence sustained a further serious loss by the charter-party.

The question for the opinion of the court, is, whether the plaintiffs had a lien on the before-mentioned goods, as against the defendants, for the said sum of 900*l.*; or, if they had no lien for the said sum of 900*l.*, whether they had a lien for the freight mentioned in the several bills of lading, making together the sum of 196*l.* 12*s.* If the plaintiffs had a lien for the 900*l.*, judgment is to be entered for the plaintiffs for that sum, and interest from the 23d of May, 1856, with costs. If they had a lien for the 196*l.* 12*s.* only, judgment is to be entered for them for that sum, without costs. But, if they are not entitled to a lien either
*143] for the 900*l.* or for the *196*l.* 12*s.*, then judgment is to be entered for the defendants, with costs.

Mellish (with whom was *Knowles*, Q. C.), for the plaintiffs.(a)—The

(a) The points marked for argument on the part of the plaintiffs, were as follows:—

"That, according to the true construction of the charter-party set out in the special case, the plaintiffs were to have a lien on all goods loaded on board the ship by the charterers, including the outward cargo, for all freight which might have become payable under the charter-party at the time such goods were to be delivered; and that, the goods in question having been placed on board the ship by the charterers, the defendants, who claim under them, are subject to the same right of lien as the charterers; or, if the plaintiffs have no lien for the full freight payable under the charter, that the plaintiffs have a lien on the goods to the extent of the bill of lading freight."

question is, whether the plaintiffs had a lien on the goods,—first, as against Syers & Co. and the shippers,—secondly, whether, if they had, the defendants could be in a better position. The goods in respect of which the lien is claimed was outward cargo, shipped at Liverpool, and delivered at Singapore. No specific freight was payable on the outward voyage: the freight was to be measured by the home voyage, —7*l.* 10*s.* per ton if loaded from China; and, if from Singapore, a lump sum of 3375*l.* But, in any event, the voyage was to terminate at Liverpool or London: and, in either case, 900*l.* was to be paid on account of the freight, by bill at three months, on the sailing of the vessel. The first question is, whether, the bill being dishonoured, the owners would have a lien for the 900*l.* on the cargo at Singapore. By the express terms of the charter-party, the owners are to have “an absolute lien upon the cargo,”—not distinguishing between outward and homeward cargo,—“for the recovery of all freight, dead freight, demurrage, &c., *due to the ship.” When the ship arrived at Singapore, the 900*l.* was due for freight, and was unpaid. [*144

Independently of that clause in the charter-party, the owners would have a lien: but that clause specifically provides for it; and the stipulation that the outward cargo was to be carried freight free makes no difference. Then, assuming that the plaintiffs would have a lien as against Syers & Co., do the defendants stand in any better position in this respect? The charter-party provides that the master shall sign bills of lading at such rates of freight as may be required by the agents of the charterers, without prejudice to the charter-party. It never could have been intended, that, the goods being shipped by the charterers, the freight should be measured by the bills of lading. [CRESSWELL, J.—As between the shippers and the shipowners, no doubt, the freight was to be measured by the charter-party.] The defendants are not the buyers of the goods, or in the ordinary sense the indorsees of the bills of lading. They are merely employed by the shippers to sell, having made certain advances on the goods. The question is, whether, under these circumstances, the effect of the bills of lading is, to limit the lien to the freight mentioned therein. The authorities are strong to show, that, where goods are shipped by the charterer, the owner's lien attaches the moment the goods are shipped, and that the consignee stands in no better position in this respect than the charterer. Thus in *Small v. Moates*, 9 Bingh. 574 (E. C. L. R. vol. 23), 2 M. & Scott, 674 (E. C. L. R. vol. 28), a lien on the lading of a ship having been expressly reserved to the owner by a charter-party,—it was held that goods which the charterer purchased and put on board, and then transferred with a stipulation to carry them to their destination for a certain amount of freight, were, even as against an endorsee of the bill of lading, subject not only to that freight, but to *the shipowner's lien for a balance due to him under the charter-party, whether possession of [*145

the ship was by the charter-party completely out of the shipowner, and vested in the charterer, or not. Tindal, C. J., says: "The rice and saltpetre were purchased by Wilkinson, the master of the ship, and shipped by him as dead freight on his own account, in January, 1828. From the moment these articles were loaded on board, the lien of the defendant attached upon them for the freight and other payments due to him under the express contract contained in the charter-party. If the master had sold the cargo of rice and saltpetre to a third person, but still retained it in his possession on board the ship, to be carried to London, it is difficult to state the principle upon which this lien, once vested in the shipowner, should have become divested from him by such sale. Where goods are put on board a general ship under a bill of lading, and the owner of the ship has by the charter-party reserved to himself a lien upon the goods laden upon board the ship for his freight due under the charter-party, he has such lien to the extent of the freight due for these particular goods under the bill of lading, whether the goods remain the property of the same person during the voyage, or are sold before delivery to a stranger: or, in other words, the extent of the shipowner's lien remains unaltered, whether the bill of lading is endorsed to a third person for a valuable consideration, or the goods are deliverable to the original consignee. And, upon the same principle, it would seem to follow, that, if the lading of the ship belongs to the charterer, and such lading is subject to the shipowner's lien for the freight reserved by the charter-party, such lading, if it be sold by the charterer after it is put on board, would pass to the purchaser, subject to the lien which the shipowner had before the sale." [CRESSWELL, J. —Here, the shipowners wilfully put it in the power of Syers & Co. to *146] *raise money upon the faith of the contract appearing on the face of the bills of lading.] *Gledstanes v. Allen*, 12 C. B. 202 (E. C. L. R. vol. 74), is also strong authority in favour of the plaintiffs. By a charter-party it was stipulated that the ship should proceed to Penang, and there load a full and complete cargo of legal merchandise from the charterers' factors, and proceed therewith to London, and there deliver the same on being paid freight "a lump sum of 2500*l.* in full of all charges." At the end of the charter-party was the following clause,— "*The captain to sign bills of lading at any rate of freight, without prejudice to this charter.* In the event of a less freight, the bills of lading of part of the cargo to be filled up for loss, if any." Under this charter-party, the charterers shipped at Penang goods of their own, for which the captain signed bills of lading at a certain specified rate of freight. The goods so shipped were consigned for sale to the plaintiffs, the correspondents of the charterers in London, who were under a general engagement to honour bills drawn upon them by the charterers, upon the faith of consignments to be made to meet them, and who were largely in advance at the time of the shipment in question: and it was

held that the owners had a lien upon the goods for the entire lump freight. Jervis, C. J., says: "No ordinary shipper would have put goods on board upon such a charter-party as this. The charterers, therefore, say,—'Give the master authority to sign bills of lading at a specified rate of freight;' to which the owners assent, provided it is not to prejudice their rights under the charter-party. The master accordingly gives bills of lading. I do not say that the owners might not have been bound to deliver the goods to a *bonâ fide* holder for value of the bills of lading, upon payment of the freight therein mentioned. But here the plaintiffs do not stand in that position: and they must be taken to have been cognisant of the *limited authority of the [147 master. Upon these short grounds, I am of opinion that this case is to be determined by the authority of *Small v. Moates*, which is express upon that point, and proceeded upon principles which are precisely applicable to the present case." And Cresswell, J., says: "According to the case of *Small v. Moates*,—in which I entirely concur,—it is difficult to see how the lien which the owners clearly had at the time of the shipment could be discharged." No case has yet held, that, where the charterer puts goods on board, and the owner's lien has attached, his right can be at all prejudiced or affected by the stipulations contained in the bill of lading. [CRESSWELL, J.—Compare *Small v. Moates* with *Faith v. The East India Company*, 4 B. & Ald. 630 (E. C. L. R. vol. 6), and *Colvin v. Newberry*, 1 Clark & Fin. 283. Tindal, C. J., in the former case, seems to think that a person who *might have known* the contents of the charter-party is in the same position as one who *does know* them.] At all events, the owners have a lien for the amount of the bill of lading freight.

Manisty, contra.(a)—The plaintiffs had no lien for either of the sums claimed. As to the bill of lading freight, the facts are these:—Syers, Walker & Co., having by the terms of the charter-party a right to carry a cargo outward freight free, for their own purposes insert a nominal freight in the bills of lading (which never could be demanded, the shipowners *having no right to it), and obtain advances from [148 the defendants on goods and freight. [WILLES, J.—All that appeared to you, was, that Syers, Walker & Co. had shipped the goods upon a contract to pay freight in Liverpool one month after the sailing of the vessel. CRESSWELL, J.—Trusting that Syers, Walker & Co. would perform that engagement, the defendants advanced money upon the shipment, increased by the value of the freight.] Nothing but the 900*l.* was to be paid by the shippers until the vessel's return. [CRESSWELL, J.—The vessel was to go to Singapore and China and back to

(a) The point marked for argument on the part of the defendants, was as follows,—“That the plaintiffs had not, as against the defendants, any lien whatever upon the goods mentioned in the three bills of lading, either for the 900*l.* mentioned in the charter-party, or for the three sums of 88*l.* 13*s.* 7*d.*, 65*l.* 14*s.* 10*d.*, and 42*l.* 3*s.* 7*d.* (making together the sum of 196*l.* 12*s.*), mentioned in the said bills of lading respectively, or any of them.”

Liverpool or London, the freight to be measured at so much per ton on the home cargo, and 900*l.* of that freight to be paid by bill at three months from the sailing. Although, therefore, the amount to be ultimately paid for freight was not ascertainable until after the ship's return, a portion of it was due before. If the goods were the goods of the charterers, it would be difficult for them under the terms of this charter-party to contend that the owners would not have a lien upon them for the whole charter freight. It may be that that lien would be suspended during the currency of the bill, but it would revive on the bill's being dishonoured. How, then, can the defendants be in a better situation than the consignors? CROWDER, J.—“The owners to have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurrage, &c., due the ship under this charter-party.” What cargo does that point to? The home cargo. [COCKBURN, C. J.—Suppose none is shipped?] In that case, the owner is remitted to his remedy by action upon the charter-party. [WILLES, J.—The ship was put up as a general ship. The captain would have to collect freight at Singapore.] As agent for the charterers. The recent case of *Marquand v. Banner*, 6 Ellis & B. 232, has a very strong bearing upon the *149] present. By a memorandum for charter, made *in Liverpool, between the plaintiff, as master, for the owners of the ship *Secret*, and M. & Co., it was agreed that (excepting the cabin, state rooms, and room for stowage of cables, &c., and crew) the vessel should be immediately made ready, and take on board from the charterers (who were to have the full reach of the hold from bulkhead to bulkhead, including the half-deck), a full cargo of merchandise and specie, the owners employing sufficient hands for the purpose, and should proceed to Buenos Ayres, and there deliver the cargo, in the usual and customary manner, agreeably to bills of lading, and so end the voyage: in consideration whereof, the affreighters to deliver the cargo alongside to be laden, and cause it to be received at the port of discharge in the usual and customary manner, and pay “for the use and hire of the said vessel, in respect of the said voyage,” 775*l.* “lump sum, in full, charterers paying for landing the measurement part of the cargo, or 850*l.* in full, the shipowners paying the lighterage, at charterers' option, to be decided before sailing from Liverpool:” payment to be made by the captain receiving “such freight as the charterers may have payable abroad as per bills of lading, not exceeding half, or by an order handed over to him by the charterers, at their option, at the current rate of exchange, which order is to be payable at the port of discharge; and the balance to be paid by the charterers' acceptance, payable in London, at three months' date from the day of sailing.” The charterers to name the lumpers and stevedores for taking in cargo and stowing; the ship to pay the lumpers, the charterers the stevedores, both to be under the direction of the master, and owners to be responsible for

improper stowage: such goods only as the charterers might direct to be received on board. "That the master shall, at the charterers' request, sign bills of lading in the usual and customary manner, and at any rate of *freight that may be filled up, and made payable in any manner the charterers may choose, without prejudice to this [*150 charter." The vessel to be consigned to the charterers' agents at her port of discharge. The charterers put up the Secret as a general ship: the plaintiff, as master, signed bills of lading at such freight and payable in such manner as they requested. They elected to pay the 850*l*. Part of the bills of lading made 244*l*. 5*s*. 2*d*. payable at Buenos Ayres; and this the plaintiff received at Buenos Ayres. The rest of the bills of lading made the freight payable "here" (Liverpool), as per margin: by the margin, it was to be paid one month after sailing, ship lost or not lost: it was not specified to whom the payment was to be made. The charterers paid a small part of the balance of the 850*l*. in cash, and, for the rest, gave their acceptance at three months, payable in London. Before the maturity of the bill, they suspended payment. The plaintiff then claimed from the shippers the portion of the bill of lading freight not yet paid: the charterers also claimed it. The plaintiff himself was one of the owners. Upon a case stated for the opinion of the court, with power to the court to draw inferences of fact,—it was held, that the plaintiff was not entitled to claim from the shippers the freights last mentioned, he having signed the bills of lading in the character only of agent for the charterers, and there being no contract between the shipowners and the shippers. [CRESSWELL, J.—I presume the Court of Queen's Bench meant also to decide, that, if the goods had been damaged, the owners would not have been liable. They must have gone that length, though they do not say so.] Wightman, J., in giving the judgment of the court, says,—“By the terms of the charter-party, the ship is let for a particular voyage, and the charterers are to pay the shipowners a lump freight for the whole voyage: and the master, at the request of the charterers, *is to make bills of lading at any rate, and payable in any manner, the charterers may [*151 choose, without prejudice to the charter. This, therefore, gives to the charterers the direct management as to the terms on which the bills of lading are to be signed. In fact, the bills of lading are not signed in any manner compromising the rights of either party; for, all the freight now in question is to be paid in Liverpool, as per margin, and the margin specifies only that it is to be paid within a month of the ship's sailing, not specifying to whom it is to be paid, leaving thus open the question who is entitled to claim the freight in other words, whose agent the master is. As far as the parties shipping the goods are concerned, there may be an unnamed principal, to whom they are to look. But, when it is once shown that the master was in fact acting for the charterers, and this is made known to the shippers, it appears to me

that the charterers are entitled to recover the freight under the general authority which the shipowners have conferred upon them. Whatever might have been the result if the charter had not contained these terms, I think it clear that the charter here makes the charterers the parties entitled to the freight." When the plaintiffs claim the lien for 900*l.* as owners, they must rely upon the charter-party as their title-deed; and then they are met by the stipulation,—“the outward cargo to be carried freight free.” [CRESSWELL, J.—May that not mean, that the owners shall not demand more than the 900*l.* for the outward cargo?] That would be defeating the very object of the parties. Besides, the 1st section of the 18 & 19 Vict. c. 111, affords a conclusive answer as to the 900*l.* Bills of lading now pass the contract to the consignee : (a) *152] and here the bill of lading states the freight *to be payable at Liverpool one month after the sailing of the vessel. The plaintiffs, therefore, are not entitled to a lien in respect of either sum.

Mellish, in reply.—The plaintiffs claim a lien in respect of the unpaid bill for 900*l.* If the court should think them not entitled to that, they are clearly entitled to the bill of lading freight. The consignees are not the less liable for the particular freight, because the master has stipulated for the payment of freight at Liverpool at a time when the goods could not have reached their destination. The consignees clearly were not entitled to the goods without paying the freight specified in the bills of lading. *Marquand v. Banner* was decided upon the authority of *Colvin v. Newberry*, 1 Clark & Fin. 283: neither of those cases can have any bearing upon the present.

COCKBURN, C. J.—I am of opinion that the plaintiffs are entitled to the judgment of the court for the smaller sum, viz. 196*l.* 12*s.*, the aggregate of the freight stipulated for by the three bills of lading. Looking at the terms of the original charter-party, and at the modification of those terms by the memorandum endorsed thereon, and applying so much of them as is applicable to the contingency which has arisen, the case stands thus:—The vessel was to take out a cargo from Liverpool to Singapore, and, in the event of her returning from Singapore to Liverpool or London, the charterers were to pay 3375*l.*, for the round out and home, 900*l.* of it by a bill at three months from the *153] sailing of the ship from *Liverpool on her outward voyage. Then comes this important provision,—“The master to sign bills of lading at such rates of freight as may be required by the agents of the charterers, without prejudice to this charter-party; and the owners to have an absolute lien upon *the cargo* for the recovery of all freight, dead freight, demurrage, &c., due the ship under this charter-party.”

(a) That section enacts that “every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself.”

It has been contended on the part of the defendants, that this stipulation for a lien upon the cargo applies only to the homeward cargo. I see no reason for so limiting it. I think it embraces all cargo, whether out or home. Having by the charter-party stipulated that 900*l.* shall be paid in advance, by an acceptance at three months' date, it appears that a bill was given, which was dishonoured before the arrival of the ship at Singapore. The cargo being expressly made liable for all freight due under the charter-party, it follows, that, on the arrival of the ship at Singapore, there was 900*l.* due for freight, for which the cargo was liable. If matters had so remained, the owners clearly would have had a lien for that 900*l.* But they have by their master become parties to bills of lading making the goods deliverable to the consignees on payment of certain specified freight; and the defendants have made advances upon the faith of those bills of lading. The owners, therefore, have, by their own act, placed third parties in a situation in which they would sustain prejudice by their insisting on the full right to which they would otherwise have been entitled. That being so, it seems to me that the utmost the plaintiffs can be entitled to recover as against the consignees, is, the freight mentioned in the three bills of lading; and for that sum, and that sum only, they are entitled to the judgment of the court.

CRESSWELL, J.—I am of the same opinion. It seems that the case of *Marquand v. Banner*, 6 Ellis & B. 232 (E. C. L. R. vol. 88), *proceeded upon the authority of *Colvin v. Newberry*, 1 Clark & Fin. 283, in which the House of Lords affirmed the judgment of [*154 the Exchequer Chamber in *Newberry v. Colvin*, 7 Bingh. 190 (E. C. L. R. vol. 20), 4 M. & P. 876, 1 C. & J. 192,† 1 Tyrwh. 55, which reversed the judgment of the Court of King's Bench in *Colvin v. Newberry*, 8 B. & C. 167 (E. C. L. R. vol. 15), 2 M. & R. 47 (E. C. L. R. vol. 17). But, in that case, the charterers were owners of the ship *pro tempore*. The contracts were made with the captain as owner, and not as agent. Here, the captain was still the agent of the shipowners; and, as they sanctioned the signing of bills of lading by him making the goods deliverable on payment of a given amount of freight, they cannot, as against the consignees, rely upon the charter-party as entitling them to a larger amount. I think the plaintiffs are clearly entitled to the freight reserved by the bills of lading. It appears by the charter-party that 900*l.* was due on account of freight three months after the ship sailed from Liverpool; and there is a stipulation that the owners shall have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurrage, &c., due under the charter-party,—that is, they are to have a lien upon the cargo for any freight due and from which it is not exonerated. The lien is upon each parcel of goods for the freight payable in respect of it. The bills of lading signed by the master show upon the face of them that the freight had not been paid.

The parties taking them, therefore, must have known that they took them subject to the risk of its not being paid, and knowing that the goods were subject to the shipowner's lien. I therefore think the plaintiffs are entitled to recover to that extent.

CROWDER, J.—I entertained some doubt at one time whether the reservation of the owners' lien for freight was not limited to freight on the homeward cargo. But, upon further consideration, I think the true *155] conclusion *is that come to by my Lord and my Brother Cresswell, viz. that the owners are to have an absolute lien upon any cargo put on board for any freight earned by the ship. The first question that arises, is, whether, as between the shipowners and the charterers, the former would be entitled to a lien for the 900*l.* agreed to be paid at three months from the ship's sailing from Liverpool. It seems to me that they would. It formed a portion of the freight for which by express agreement the lien was to attach. But I agree with the rest of the court in thinking that that amount cannot be recovered here, the owners having by their agent signed bills of lading making the goods deliverable on payment of the smaller amount,—one of the terms of the bills of lading being, that such freight should be payable one month after the sailing of the vessel. The lien extends only to the amount of freight mentioned in the bills of lading.

WILLES, J.—I am of the same opinion. The argument that the outward cargo is liable to the lien for the 900*l.* is strengthened by the demurrage clause. Demurrage might have become due and payable before the arrival of the vessel at Singapore. The contract is, that "the owners shall have an absolute lien upon the cargo for the recovery of all freight, dead freight, *demurrage*, &c., due the ship under this charter-party." The words "upon the cargo" mean, upon the cargo from time to time put on board the vessel. I do not think it necessary to add anything more to what has already fallen from the court. With regard to the case of *Marquand v. Banner*, 6 Ellis & B. 232 (E. C. L. R. vol. 88), I think it must rest upon the ground stated by my Brother Cresswell. I do not exactly see how, if sustainable at all, it can be upon any other ground.

Judgment for the plaintiffs for 196*l.* 12*s.* without costs.

***PHILLIPS and Another v. CLARK. April 23. [*156**

A stipulation in a bill of lading, that the shipowner is "not to be accountable for leakage or breakage," does not exempt him from responsibility for a loss by these means, arising from gross negligence.

THE declaration stated that the plaintiffs delivered to the defendant, and the defendant accepted and received from the plaintiffs, certain goods of the plaintiffs', to be carried in a certain ship of the defendant, to wit, from London to Calcutta, and thence back to London (certain perils and casualties only excepted), for certain freight and reward in that behalf payable by the plaintiffs to the defendant, and upon the terms that the defendant should use due and proper care in and about the stowage of the goods; and that, though the plaintiffs had done all things, and all things had happened, necessary to entitle them to have the goods so stowed, yet that the defendant did not nor would use due and proper care in and about the stowage of the said goods, but so carelessly and negligently stowed the same contrary to his said duty, that, by reason thereof, and not by reason of any of the said excepted perils or casualties, the said goods were greatly damaged and injured: And the plaintiffs claimed 500*l*.

Fourth plea,—that the plaintiffs delivered the said goods to the defendant, and he accepted and received the same, to be carried as in the declaration mentioned, *upon the express condition only that the defendant should not be accountable for leakage or breakage*; and that the loss and damage complained of by the plaintiffs arose wholly from leakage and breakage, and not otherwise.

Second replication to the fourth plea,—that the condition in that plea mentioned consisted of certain words inserted by the defendant in the margin of the bill of lading under which the said goods were shipped on board *the said ship of the defendant to be carried as in the declaration mentioned, which said bill of lading was in the words [*157 and figures following, that is to say:—

"Shipped in good order and well-conditioned, by Phillips, King & Co., in and upon the good ship called the Bengal, whereof is master for this present voyage James Clark, and now riding at anchor in the East India Dock, and bound for Calcutta, and from thence back to London,

"E.I. } 1/10... 10 butts.
P.S. }
E.I. } 11/30... 20 hhds.
F.B.S. } 31/33... 3 butts.
P.K. }
E.L. } 1... 1 butt (cased)."

Thirteen butts
Twenty hogsheads
One cased butt

} of sherry
wine.

being marked and numbered as in the margin, and are to be delivered in the like good order and well-conditioned at the aforesaid port of

*Weight and contents unknown. Not accountable for leakage or breakage."

London (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, save risk of boats so far as ships are liable thereto, excepted,) unto order, or to his or their assigns. Freight for the said goods to be paid in London, at the rate of 5*l.* sterling per butt, with primage 5 per cent., for the aforesaid voyage from London to Calcutta and from thence back to London, ship lost or not lost; with primage and average accustomed. In witness whereof the [*158 *master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, one of which bills being accomplished, the others to stand void.

"Dated in London, the 25th of October, 1854.

(Signed) "JAMES CLARK."

Endorsement: "It is agreed that the within-mentioned wines, or any portion thereof, may be landed at Calcutta under the consignees' order, should they desire to do so, freight being paid at the rate of 40*s.* sterling per butt, which is to cancel the agreement for delivery back to London on the quantity that may be landed.

(Signed) "GEORGE DUNCAN,

"PHILLIPS, KING & Co"

Averment, that the loss and damage in that plea mentioned *arose wholly from the gross negligence of the defendant and his servants in and about the stowage of the said goods, and not otherwise.*

The defendant took issue on the plaintiff's second replication to the fourth plea, and also demurred thereto on the ground that "the memorandum in the bill of lading exempted him from liability for leakage and breakage, whether arising from negligence or not." Joinder.

[*159] *J. Brown*, in support of the demurrer.(a)—The question *in this case is, whether the defendant is protected by the terms of his contract from liability, under all circumstances, for damage arising from leakage and breakage,—whether the special clause does not protect him even against the consequences of negligence, however gross. The words are as general as possibly can be conceived. The construction to be contended for on the other side would seek to add words similar

(a) The points marked for argument on the part of the defendant, were,—

"That the clause in the bill of lading exempts the defendant from liability for leakage and breakage, whether arising from negligence or not; that, to construe it as only applying to leakage or breakage occurring without the defendant's default, is altering the contract; and that no intention so to limit the defendant's protection can be gathered from either the words of the bill of lading or the nature of the contract."

to these,—“arising without the owner’s default.” That, it is submitted, would be adding most unjustifiably to the terms of the written contract. It will probably be said that an exception of that sort is to be implied from the nature of the undertaking, and that it is unreasonable that the defendant should thus protect himself from loss or damage arising from his own acts, or from those of his crew. But stipulations of that sort are not new : they are now almost universal in the case of contracts for conveyance by railway : see *Carr v. The Lancashire and Yorkshire Railway Company*, 7 Exch. 707.† The construction contended for on the other side would in every case provoke litigation,—the very thing which the introduction of the clause was designed to prevent. [COCKBURN, C. J.—Is the owner to break and to allow others to break, without incurring any responsibility? Is there to be no limit? I think it can hardly be permitted to him to contend that he inserted the clause for the purpose of protecting himself against negligence. Suppose the master knew that the crew had tapped the casks on the voyage, are you prepared to say that the owner would not be responsible for negligence in that respect?] It is perfectly competent to every carrier, whether by land or by water, to protect himself against responsibility for negligence of any sort. [COCKBURN, C. J.—No doubt, if the person sending goods chooses to agree with the carrier that he shall not be responsible for negligence, however gross, he is at liberty to do so. But, can we in a court of justice *put so absurd a [*160 construction upon language that is susceptible of another and a more rational construction?] There is no such absurdity in the stipulation in question as to warrant the court in introducing the exception suggested. Nor can it be said, considering the small amount of the freight, as compared with the length of the voyage and the value of the goods, that the stipulation is unreasonable. [CROWDER, J.—Suppose the leakage arose from the *wilful* act of the master himself, would the owner still be irresponsible?] For the master’s direct connivance in the abstraction of the wine, the owner might possibly be liable. [WILLES, J., referred to *De Rothschild v. The Royal Mail Steam-Packet Company*, 7 Exch. 734.†] The law upon this subject is well laid down in *Hinton v. Dibbin*, 2 Q. B. 646 (E. C. L. R. vol. 42), 2 Gale & D. 36, where it was held, under the statute 11 G. 4 & 1 W. 4, c. 68, that, if a parcel containing any of the valuable goods enumerated in s. 1 be sent to a carrier for conveyance, without a declaration of the nature and value of such goods, and without paying, or engaging to pay, an increased charge according to s. 2, the carrier is not liable for their loss, though it happen by the gross negligence of his servants. Lord Denman, in giving judgment in that case, elaborately reviews all the previous authorities as to the effect and meaning of “gross negligence” in contracts of this sort : and the decision has ever since been acted upon. The doctrine of the older cases as to common carriers,—see

Lyon v. Wells, 5 East, 428, and that class of cases,—is very much shaken, if not altogether overturned, by the modern authorities: and, at all events, those cases are wholly inapplicable to contracts by bill of lading. This contract is to be construed just like any other. It is not enough to suggest that it would be reasonable to limit it in the way proposed: it must be shown that there is an invincible necessity for implying that such a limitation or exception was contemplated by the parties *when they entered into the contract. [WILLES, J.—*161] Suppose the vessel were taken by a Russian man of war under such circumstances as that by the exercise of ordinary care the captain might have escaped capture, would the exception of the Queen's enemies absolve him from the consequences of his negligence?] Possibly not. But here we have an express contract, which is clear and unambiguous.

Sumner, contra, was not called upon.(a)

COCKBURN, C. J.—This was an action for an injury sustained by goods delivered to the defendant, a carrier by water, to be carried from London to Calcutta and back, upon a contract containing an exception of certain perils and casualties; and the declaration charges a loss arising from improper stowage, and not by reason of any of the excepted perils and casualties. The defendant pleads that the goods were delivered to him to be carried upon the express condition only that the defendant should not be accountable for leakage or breakage, and that the damage complained of arose from those causes, and not otherwise. The plaintiff replies that the loss and damage arose wholly from the *gross negligence* of the defendant and his servants in and about the stowage of the goods. And the defendant demurs. The question arises upon these words in the margin of the bill of lading,—“Not *162] accountable for leakage or breakage.” *Admitting that a carrier may protect himself from liability for loss or damage to goods intrusted to him to carry, even if occasioned by negligence on the part of himself or his servants, provided any one is willing to contract with him on such terms; yet it seems to me that we ought not to put such a construction upon the contract as is here contended for, when it is susceptible of another and a more reasonable one. It is not to be supposed that the plaintiff intended that the defendant should be exempted from the duty of taking ordinary care of the goods that were intrusted to him. When it is borne in mind what is the ordinary duty of a carrier, it is plain what the parties intended here. So long ago as in the case of *Dale v. Hall*, 1 Wils. 187, it is laid down (by Lee, C. J.)

(a) The points marked for argument on the part of the plaintiff, were,—“That the memorandum in the bill of lading did not protect the defendant from liability for losses owing to the negligence of the defendant and his servants; that it did not protect him from liability for losses occasioned by the *gross negligence* of the defendant and his servants; and that it only protected him from losses arising in the course of the voyage, and not from damage occasioned by bad stowage.”

that "everything is a negligence in a carrier or hoyman that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by the act of God or the King's enemies; and a promise to carry safely, is a promise to keep safely." Amongst the events which the carrier here would under ordinary circumstances be responsible for, are, leakage and breakage. He stipulates to be exempted from the liability which the law would otherwise cast upon him in these respects. But there is no reason why, because he is by the terms of the contract relieved from that liability, we should hold that the plaintiff intended also to exempt him from any of the consequences arising from his negligence. The contract being susceptible of two constructions, I think we are bound to put that construction upon it which is the more consonant to reason and common sense; and to hold that it was only intended to exempt him from his ordinary common law liability, and not from responsibility for damage resulting from negligence. I therefore think the plaintiff is entitled to judgment.

*CRESWELL, J.—I am of the same opinion. Ordinarily, the master undertakes to take due and proper care of goods intrusted [163 to him for conveyance, and to stow them properly; and he is responsible for leakage and breakage. Here he expressly stipulates not to be accountable for leakage or breakage, leaving the rest as before. That is the whole case.

CROWDER, J.—The simple question is, what did the parties intend by the contract they have entered into: and this we must gather from the words they have used. It could hardly have been contemplated by the plaintiff that the defendant should be utterly absolved from the obligation of taking any care of the goods. The construction put upon the contract by my Lord, is evidently the most just and reasonable,—as absolving the defendant from liability for leakage and breakage the result of mere accident, where no blame was imputable to the master, and for which but for the stipulation in question he would still have been liable. It clearly was not intended to relieve him from responsibility for leakage or breakage the result of his negligence and want of care. The construction contended for on the part of the defendant would be giving the contract a sense not necessarily involved in the words as they stand.

WILLES, J.—I also am of opinion that the plaintiff is entitled to judgment on this demurrer. The introduction of the words in the margin of the bill of lading is sufficiently accounted for by the fact that without them the defendant would have been bound to the strictest care, so as to deliver the goods at the end of the voyage in the same state and condition as they were in when he received them, without reference to negligence. It appears from the observations of Lord Wensleydale, in *Walker v. Jackson*, 10 M. & W. 161, 169,† that, in the

*164] *absence of fraud, the carrier is bound as an insurer to carry and deliver the goods as they are when he receives them,—as is pointed out by some members of the court in *Wyld v. Pickford*, 8 M. & W. 448.† The defendant gets rid of that liability in the present case by the introduction of the words “not accountable for leakage or breakage,” but not of the obligation which the law imposes upon him of taking reasonable care of the goods intrusted to him. It is no more than putting the leakage and breakage on the same footing as the act of God or the Queen’s enemies. Suppose a vessel were taken by the enemy in consequence of the master’s neglect of precautions which he might easily have taken,—could the owners claim an exemption on the ground of the capture? Clearly not; for, the exception necessarily implies that the capture shall not be occasioned by the act or default of the owners or the master. Lord Tenterden, in his *Treatise on Shipping*, p. 386, treating of the exception as to robbery by pirates, and citing *Emerigon*, Tom. I., p. 532, refers to *Morse v. Slue*, 1 Vent. 190, “in which the owners were held responsible for goods taken by robbery from the ship in the river Thames within the body of a county, Chief Justice Hale took notice of this doctrine, and said, ‘by the civil Admiral law, the owners are not responsible for a robbery by pirates at sea.’ This, however, is to be understood only in case the ship does not fall into the hands of pirates by any neglect or fault of the master.” That is equally applicable to the additional exception here of leakage and breakage. The true meaning of this contract is,—“I will take all reasonable care of the goods, but will not be accountable for a loss arising from leakage or breakage such as usually happens without the exercise of extraordinary care.” The owner engages only to abstain from negligence. The result, therefore, is, that as, upon this record, *165] the damage is alleged to have occurred through *the negligence of the master causing the leakage and breakage, the defendant is responsible for it; and therefore there must be judgment for the plaintiff.

Judgment for the plaintiff.

The terms of any special agreement or notice limiting the liability of common carriers will not be extended to the consequences of their own negligence: *Bean v. Green*, 3 Fairf. 422; *Fairchild v. Slocum*, 19 Wendell, 329, 7 Hill, 292; *Swindler v. Hilliard*, 2 Richardson, 286; *Fish v. Chapman*, 2 Kelly, 349; *Laing v. Colder*, 8 Barr, 479; *Sager v. The Railroad Co.*, 31 Maine, 228; *Dorr v. New Jersey Co.*, 4 Sandf. Sup. Ct. 136; *Camden and Amboy v. Baldauf*, 4 Harris, 67; *Reno v. Hogan*, 12 B. Monroe, 63; *Stoddard v. Long Island Railroad*, 5 Sandf. 180

BLOOMER v. DARKE. April 23.

A plea of arrangement under the 224th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), is not good, unless it shows on the face of it that the deed is for the distribution of the whole of the debtor's estate, and enures for the benefit of *all* the creditors.

And, *crimble*, that the want of such averments in the plea is not supplied by the general allegation that "all matters and things were done and happened according to the said act to make the deed, and the said release therein contained, as effectual and obligatory in all respects upon the creditors, including the plaintiff, who did not sign the said deed, as if they had duly signed the same."

THIS was an action by drawer against acceptor on two bills of exchange dated respectively the 11th of December, 1854, and 1st of November, 1855, each at four months' date, the one for 112*l.* 10*s.*, the other for 107*l.* 10*s.*; with counts for goods sold and delivered, and for money due upon accounts stated.

Plea,—that, before and at the time of making the deed thereafter mentioned, and for six calendar months and upwards next immediately before the suspension of payment thereafter mentioned, the defendant was a trader liable to become bankrupt under the bankrupt laws, and within the meaning of the Bankrupt Law Consolidation Act, 1849, and that, before and at the said time of his suspending payment as thereafter mentioned, and making the said deed, he was indebted to the plaintiff and divers other persons in divers sums, and was and would be unable to pay the same in full: That, being such trader, and so indebted as aforesaid, he suspended payment: That thereupon, afterwards, and after the accruing of the causes of action in the declaration mentioned, and after the 11th of October, 1849, and more than three calendar months before the suit, a deed of arrangement was entered into *between the defendant and his creditors, and signed by or on [*166 behalf of six-sevenths in number and value of those creditors whose debts amounted to 10*l.* and upwards, touching the defendant's liabilities and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, each of the creditors of the defendant being in the computation of the amount of his debt accounted a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property, and other such available securities or liens from the defendant, appeared to be the balance due to him: That the said deed was an indenture expressed to be made by and between the defendant of the first part, C. Simpson, H. R. Morley, J. Charlesworth, and J. Kitson the younger, therein described as trustees for the purposes therein mentioned, of the second part, and the several other persons whose names or partnership firms were thereunto subscribed and set, and seals affixed, by themselves, their partners, attorneys, or agents thereunto duly authorized, being creditors of the defendant for the respective sums of money set or mentioned opposite to the names or partnership

that the charterers are entitled to recover the freight under the general authority which the shipowners have conferred upon them. Whatever might have been the result if the charter had not contained these terms, I think it clear that the charter here makes the charterers the parties entitled to the freight." When the plaintiffs claim the lien for 900*l.* as owners, they must rely upon the charter-party as their title-deed; and then they are met by the stipulation,—“the outward cargo to be carried freight free.” [CRESWELL, J.—May that not mean, that the owners shall not demand more than the 900*l.* for the outward cargo?] That would be defeating the very object of the parties. Besides, the 1st section of the 18 & 19 Vict. c. 111, affords a conclusive answer as to the 900*l.* Bills of lading now pass the contract to the consignee : (a) *152] and here the bill of lading states the freight *to be payable at Liverpool one month after the sailing of the vessel. The plaintiffs, therefore, are not entitled to a lien in respect of either sum.

Mellish, in reply.—The plaintiffs claim a lien in respect of the unpaid bill for 900*l.* If the court should think them not entitled to that, they are clearly entitled to the bill of lading freight. The consignees are not the less liable for the particular freight, because the master has stipulated for the payment of freight at Liverpool at a time when the goods could not have reached their destination. The consignees clearly were not entitled to the goods without paying the freight specified in the bills of lading. *Marquand v. Banner* was decided upon the authority of *Colvin v. Newberry*, 1 Clark & Fin. 283: neither of those cases can have any bearing upon the present.

COCKBURN, C. J.—I am of opinion that the plaintiffs are entitled to the judgment of the court for the smaller sum, viz. 196*l.* 12*s.*, the aggregate of the freight stipulated for by the three bills of lading. Looking at the terms of the original charter-party, and at the modification of those terms by the memorandum endorsed thereon, and applying so much of them as is applicable to the contingency which has arisen, the case stands thus:—The vessel was to take out a cargo from Liverpool to Singapore, and, in the event of her returning from Singapore to Liverpool or London, the charterers were to pay 3375*l.*, for the round out and home, 900*l.* of it by a bill at three months from the *153] sailing of the ship from *Liverpool on her outward voyage. Then comes this important provision,—“The master to sign bills of lading at such rates of freight as may be required by the agents of the charterers, without prejudice to this charter-party; and the owners to have an absolute lien upon *the cargo* for the recovery of all freight, dead freight, demurrage, &c., due the ship under this charter-party.”

(a) That section enacts that “every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself.”

It has been contended on the part of the defendants, that this stipulation for a lien upon the cargo applies only to the homeward cargo. I see no reason for so limiting it. I think it embraces all cargo, whether out or home. Having by the charter-party stipulated that 900*l.* shall be paid in advance, by an acceptance at three months' date, it appears that a bill was given, which was dishonoured before the arrival of the ship at Singapore. The cargo being expressly made liable for all freight due under the charter-party, it follows, that, on the arrival of the ship at Singapore, there was 900*l.* due for freight, for which the cargo was liable. If matters had so remained, the owners clearly would have had a lien for that 900*l.* But they have by their master become parties to bills of lading making the goods deliverable to the consignees on payment of certain specified freight; and the defendants have made advances upon the faith of those bills of lading. The owners, therefore, have, by their own act, placed third parties in a situation in which they would sustain prejudice by their insisting on the full right to which they would otherwise have been entitled. That being so, it seems to me that the utmost the plaintiffs can be entitled to recover as against the consignees, is, the freight mentioned in the three bills of lading; and for that sum, and that sum only, they are entitled to the judgment of the court.

CRESSWELL, J.—I am of the same opinion. It seems that the case of *Marquand v. Banner*, 6 Ellis & B. 232 (E. C. L. R. vol. 88), *proceeded upon the authority of *Colvin v. Newberry*, 1 Clark & Fin. 283, in which the House of Lords affirmed the judgment of [*154 the Exchequer Chamber in *Newberry v. Colvin*, 7 Bingh. 190 (E. C. L. R. vol. 20), 4 M. & P. 876, 1 C. & J. 192,† 1 Tyrwh. 55, which reversed the judgment of the Court of King's Bench in *Colvin v. Newberry*, 8 B. & C. 167 (E. C. L. R. vol. 15), 2 M. & R. 47 (E. C. L. R. vol. 17). But, in that case, the charterers were owners of the ship *pro tempore*. The contracts were made with the captain as owner, and not as agent. Here, the captain was still the agent of the shipowners; and, as they sanctioned the signing of bills of lading by him making the goods deliverable on payment of a given amount of freight, they cannot, as against the consignees, rely upon the charter-party as entitling them to a larger amount. I think the plaintiffs are clearly entitled to the freight reserved by the bills of lading. It appears by the charter-party that 900*l.* was due on account of freight three months after the ship sailed from Liverpool; and there is a stipulation that the owners shall have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurrage, &c., due under the charter-party,—that is, they are to have a lien upon the cargo for any freight due and from which it is not exonerated. The lien is upon each parcel of goods for the freight payable in respect of it. The bills of lading signed by the master show upon the face of them that the freight had not been paid.

The parties taking them, therefore, must have known that they took them subject to the risk of its not being paid, and knowing that the goods were subject to the shipowner's lien. I therefore think the plaintiffs are entitled to recover to that extent.

CROWDER, J.—I entertained some doubt at one time whether the reservation of the owners' lien for freight was not limited to freight on the homeward cargo. But, upon further consideration, I think the true *155] conclusion *is that come to by my Lord and my Brother Cresswell, viz. that the owners are to have an absolute lien upon any cargo put on board for any freight earned by the ship. The first question that arises, is, whether, as between the shipowners and the charterers, the former would be entitled to a lien for the 900*l.* agreed to be paid at three months from the ship's sailing from Liverpool. It seems to me that they would. It formed a portion of the freight for which by express agreement the lien was to attach. But I agree with the rest of the court in thinking that that amount cannot be recovered here, the owners having by their agent signed bills of lading making the goods deliverable on payment of the smaller amount,—one of the terms of the bills of lading being, that such freight should be payable one month after the sailing of the vessel. The lien extends only to the amount of freight mentioned in the bills of lading.

WILLES, J.—I am of the same opinion. The argument that the outward cargo is liable to the lien for the 900*l.* is strengthened by the demurrage clause. Demurrage might have become due and payable before the arrival of the vessel at Singapore. The contract is, that "the owners shall have an absolute lien upon the cargo for the recovery of all freight, dead freight, *demurrage*, &c., due the ship under this charter-party." The words "upon the cargo" mean, upon the cargo from time to time put on board the vessel. I do not think it necessary to add anything more to what has already fallen from the court. With regard to the case of *Marquand v. Banner*, 6 Ellis & B. 232 (E. C. L. R. vol. 88), I think it must rest upon the ground stated by my Brother Cresswell. I do not exactly see how, if sustainable at all, it can be upon any other ground.

Judgment for the plaintiffs for 196*l.* 12*s.* without costs.

***PHILLIPS and Another v. CLARK. April 23. [*156**

A stipulation in a bill of lading, that the shipowner is "not to be accountable for leakage or breakage," does not exempt him from responsibility for a loss by these means, arising from gross negligence.

THE declaration stated that the plaintiffs delivered to the defendant, and the defendant accepted and received from the plaintiffs, certain goods of the plaintiffs', to be carried in a certain ship of the defendant, to wit, from London to Calcutta, and thence back to London (certain perils and casualties only excepted), for certain freight and reward in that behalf payable by the plaintiffs to the defendant, and upon the terms that the defendant should use due and proper care in and about the stowage of the goods; and that, though the plaintiffs had done all things, and all things had happened, necessary to entitle them to have the goods so stowed, yet that the defendant did not nor would use due and proper care in and about the stowage of the said goods, but so carelessly and negligently stowed the same contrary to his said duty, that, by reason thereof, and not by reason of any of the said excepted perils or casualties, the said goods were greatly damaged and injured: And the plaintiffs claimed 500*l*.

Fourth plea,—that the plaintiffs delivered the said goods to the defendant, and he accepted and received the same, to be carried as in the declaration mentioned, *upon the express condition only that the defendant should not be accountable for leakage or breakage*; and that the loss and damage complained of by the plaintiffs arose wholly from leakage and breakage, and not otherwise.

Second replication to the fourth plea,—that the condition in that plea mentioned consisted of certain words inserted by the defendant in the margin of the bill of lading under which the said goods were shipped on board **the said ship of the defendant to be carried as in the* [*157
declaration mentioned, which said bill of lading was in the words
and figures following, that is to say:—

"E.I.	}	1/10... 10 butts.
P.S.		
		11/30... 30 hhds.
E.I.	}	31/33... 3 butts.
P.S.		
P.K.	}	1... 1 butt (cased)."
E.L.		

"Shipped in good order and well-conditioned, by Phillips, King & Co., in and upon the good ship called the Bengal, whereof is master for this present voyage James Clark, and now riding at anchor in the East India Dock, and bound for Calcutta, and from thence back to London,

Thirteen butts	} of sherry
Twenty hogsheads	
One cased butt	

being marked and numbered as in the margin, and are to be delivered in the like good order and well-conditioned at the aforesaid port of

firms of such creditors in the schedule thereof thereunder written," of the third part. The plea then goes on to allege that by the said deed the defendant assigned "his estate and effects" (meaning *all* his estate and effects) to the said trustees in manner and for the purposes therein mentioned; that the creditors parties to the deed thereby agreed to accept and take the estate and effects thereby assigned in full satisfaction and discharge of their several and respective debts and demands, and thereby released and discharged the debtor. Then there is an allegation, that, more than three calendar months before the suit, the plaintiff had notice from the defendant of his suspension of payment, and of such deed of arrangement; and the plea concludes with a general averment "that all matters and things were done and happened according to the said act to make the said deed, and the said release therein contained, as effectual and obligatory in all respects upon the creditors, including the plaintiff, who did not sign the said deed, as if they had duly signed the same." Now, this plea clearly would not be proved unless the defendant showed a deed in all respects complying with the requisitions of the statute. [CRESSWELL, J.—The general words "that all matters and things were done and happened," &c., cannot surely be read "all words were inserted in the deed necessary to make it a compliance with the act."] The 224th section says that a deed to the purport mentioned, and signed by the required number of creditors, "shall *be as *effectual* and *obligatory* in all respects upon all the *174] creditors who shall *not* have signed such deed or memorandum of arrangement, as if they *had* duly signed the same,"—that is, when signed by six-sevenths, it shall enure for the benefit of *all*. [COCKBURN, C. J.—Assuming that the deed purports to be such a deed as the statute requires. CRESSWELL, J.—The deed purporting to be an assignment for the benefit of those who execute it, would the trustees be justified in paying dividends to those who have not signed?] Yes: the deed is for the benefit of the general body. [CROWDER, J.—The deed clearly appears to be for the benefit only of "the parties hereto."] Upon the plea it does not appear to be so limited. [WILLES, J.—Suppose such a deed as this had been made before the statute, and a suit in Chancery against the trustees to enforce payment to a creditor who had not executed it,—would such creditor be entitled to participate in the fund? Your contention is, that the words at the latter part of the 224th section operate to introduce a person who but for the statute would not be within the deed.] Creditors who have *not* executed the deed are by the terms of that section placed precisely in the same position as if they *had* executed. [COCKBURN, C. J.—Even if it appeared to be the intention of the deed to exclude those creditors who did not execute?] If the deed contain words of exclusion, it is not a deed within the statute. [COCKBURN, C. J.—What is there upon the face of this deed, as stated in the plea, to show it to be a deed within

the statute?]) The plea clearly would not be proved unless we showed a deed in conformity with the act. [CRESSWELL, J.—We do not know what the trusts of the deed are: and, unless it is such as to enure for the distribution of *all* the debtor's estate and effects amongst *all* his creditors, it is not a deed within the statute.] The case of *Macnaught v. Russell*, 1 Hurlst. & N. 611,† concurs with the view *which [*175 the court seem inclined to take. The defendant, therefore, will pray leave to amend, by setting out the deed more fully.

Gray, for the plaintiff, asked that it might be imposed as a condition that he should be furnished with a copy of the deed, or allowed to inspect it. This was assented to.

Leave to amend, on the usual terms.(a)

(a) The plea was not amended, and the plaintiff had judgment.

TAYLOR and Another v. STRAY. *April 2.*

The plaintiffs, stock-brokers, and members of the London Stock Exchange, on the 28th of August, 1856, at the request of the defendant, bought for him twenty shares in a joint-stock bank called *The Royal British Bank*, to be paid for on the "settlement day," which was on the 15th of September, and duly forwarded to him the usual broker's contract-note. The bank stopped payment on the 3d of September, and ultimately became bankrupt. On the 11th, the defendant repudiated the transaction, and gave the plaintiffs notice not to pay the price on his account. The plaintiffs having been compelled according to the rules of the Stock Exchange to pay for the shares on the settlement day, sent the defendant the certificates and transfers, and, upon his declining to accept them, sued him for money paid:—Held, that they were entitled to recover.

THIS was an action brought to recover the sum of 648*l.* 10*s.*, being the price of twenty shares in the *Royal British Bank*, which had been bought by the plaintiffs, as the brokers of the defendant, and had been paid for by the plaintiffs under the circumstances hereinafter mentioned, and also 5*l.*, being the plaintiffs' commission on the purchase of the shares. The declaration contained counts for money paid, work and labour, and for money due upon accounts stated. The defendant pleaded never indebted.

The cause was tried before *Willes, J.*, at the sittings in London after Michaelmas Term, 1856, when the facts appeared to be as follows:—

The plaintiffs (*Taylor & Aston*) are members of the Stock Exchange, in London, and carry on the business of stock and share-brokers in partnership together. On the 28th of August, 1856, the defendant had a *conversation with *Aston* respecting the price of shares [*176 in the *Royal British Bank*, and requested him to purchase on the Stock Exchange for him twenty shares, at 32*l.* per share, for the account day on the 15th of September then next. On the same day, *Aston* bought for the defendant on the Stock Exchange twenty shares at the price named, of one *Russell*, a jobber or dealer in bank shares

upon, and a member of, the Stock Exchange. Russell was not himself, nor was Wadeson, a broker and member of the Stock Exchange of whom Russell bought sixteen of the shares, at any time a registered owner of any shares in the Royal British Bank; but Russell did not buy to fulfil his contract, but had shares to the amount required in his possession, or a right to them, and a control over them, at the time of the sale. There were at this time only two jobbers who dealt in these shares, and Russell was one of them. The Royal British Bank was then supposed to be solvent.

The purchase was made subject and according to the practice of the Stock Exchange. There was no written contract: but the plaintiffs and Russell each made a memorandum of the bargain.

It was proved to be the practice of the Stock Exchange before and at the time of the transaction in question,—first, that the seller is not bound to transfer, nor the buyer's broker to procure, shares from the person named in the note sent by the buyer's broker to his principal (in this case designated by the words "of Russell"),—secondly, that members of the Stock Exchange, in bargains for customers, make themselves liable for their performance,—thirdly, that, in case of non-performance by a member, the committee is referred to, and decides; and, if their order is disobeyed, the disobedient party is expelled,—fourthly, that, on the Stock Exchange, payment is made for shares, on *177] handing the shares and a transfer; that the seller is paid by the *purchasing broker on handing the shares and transfer, as was done in this case; and that that is so as to all kinds of shares.

The plaintiffs had previously to the 28th of August, 1856, purchased Ottoman Bank shares on the Stock Exchange for the defendant, for an account day, in the usual way, and to pay for which the defendant furnished the plaintiffs with the money previously to the settling day.

On the 28th of August, the plaintiffs announced to the defendant that they had purchased the shares, by a letter as follows,—“We have managed to purchase the twenty British Bank shares at 32l., agreeably to your directions, for the 15th of September. Contract herein.”

This letter contained an enclosure called by the plaintiffs in their letter the contract relating to the purchase, which was in the following terms:—

“2 Capel Court, London.

“No. 5835.

28th August, 1856.

“Bought for Frederick Stray, Esq., for 15th September (50l. paid), twenty Royal British Bank shares, of Russell.

“Consideration	£640	0	0
“Stamp		3	10 0
“Registration		2	6
“Commission		5	0 0

£648 12 6

“Taylor & Aston, Brokers.”

The Royal British Bank stopped payment on the 8d of September, 1856, at 11.30 A. M.

On the 8th of October, the time for paying or compounding a debt expired, whereby the bank committed an act of bankruptcy, which had relation to the 8th of September.

*Early on the morning of the 3d of September, the defendant had a conversation with Aston respecting the shares in question; [*178 and Aston told the defendant that British Bank shares had been dealt in that morning at 20l. per share; and thereupon the defendant expressed a wish to sell the shares in question at that price. At this time the plaintiffs did not know, nor did it appear, whether the bank had then stopped. The plaintiff Aston then went on to the Stock Exchange, and tried to sell the said shares, but could not. The defendant waited whilst he did so, and was informed of the result of the attempt.

On the 8th of September, the defendant saw Aston, who told him that the failure of the bank did not vitiate the contract of purchase; and the defendant said, that, at all events, he should not have the shares transferred to his own name, but should have them transferred into the name of a man of straw. Aston requested authority for that purpose in writing, and was also desirous of obtaining a recognition in writing, of the purchase by the defendant; and Aston drew out a memorandum for the defendant to sign, which was in the following terms:—

“2 Capel Court, 8th September, 1856.

“Messrs. Taylor & Aston, stock and share brokers.

“Gentlemen,—I request you will not pass my name for the twenty British Bank shares purchased on the 28th of August, as they are not intended to be transferred to me.”

The defendant took this memorandum away with him to consider about it; and, having done so, refused to sign it: and before the 15th of September, he returned it unsigned to Mr. Aston.

On the 11th of September, 1856, the defendant, by his attorney, wrote and sent the plaintiffs the following letter:—

*“Gentlemen,—Having now had an opportunity of ascertaining with some precision the state of the Royal British Bank, not [*179 only at the time of the recent sale of their shares in the market, but for some time previously, and the circumstances under which the shares were sent into the market, and the many grounds of objection to the acceptance of such shares under existing circumstances, I give you notice that Mr. Stray will not take any shares in the said bank; and, further, that you do not pay any money on his account for or in respect of any alleged purchase by him of any such shares.”

On the 11th and 13th of September, 1856, the plaintiffs wrote and sent to the defendant letters of which the following are copies:—

"2 Capel Court, 11th September, 1856.

"Stock Exchange.

"Royal British Bank.

"Resolved, that no circumstances have been submitted to the committee to induce them to interfere with the settlement of the Royal British Bank shares in the ordinary way.

"By order.

"G. WEBB, secretary."

"Dear Sir,—Our committee have to-day come to the above decision as to the transactions in the Royal British Bank shares. We have, therefore, to request you to enclose us a check for 648*l.* 12*s.* 6*d.* by the 15th instant, being the cost of the twenty shares purchased on the 28th ult. for you and by your instructions, and for which we shall have to pass your name on that day.

Yours, &c.

"TAYLOR & ASTON."

"Frederick Stray, Esq."

"2 Capel Court, 13th September, 1856.

"Dear Sir,—We have received some letters as to the purchase of the
*180] twenty Royal British shares at 32*l.* per *share on the 28th August for payment on the 15th September, to suit your convenience, and in accordance with the customs and rules of the Stock Exchange made by us as brokers by your instructions and for your account, of Mr. Russell, as per contract rendered you on that day; and, as we are informed, we must, as brokers, and in accordance with those rules, give your name, and pay the consideration undertaken for the shares, although of doubtful value, the same as we should have done, and handed them to you, had they been worth twice your purchase-money. We cannot, therefore, relieve ourselves of the contract entered into on your behalf and by your direction, and shall hold you liable for whatever we may be called upon to pay as the consequence of your orders to effect the purchase for you on the 28th ult.

"Yours faithfully, "TAYLOR & ASTON."

"F. Stray, Esq."

The charter of the Royal British Bank (which was put in) recites the deed of settlement of the bank on its formation under the 7 & 8 Vict. c. 113: the following clauses were read:—

"10. That it should be lawful for every proprietor, and for every person claiming in his or her right in any way howsoever, *with consent of the court of directors*, to sell and transfer, by deed duly stamped, in which the consideration should be truly stated, the shares to which he or they should be entitled, or any of them, to any person or persons, subject nevertheless to the conditions or restrictions therein contained; and that the same, when duly executed, should be delivered to the secretary or other proper officer of the company, and be kept by him;

and he should enter a memorial thereof in a book to be kept at the head banking house aforesaid, to be called the 'Register of Transfers,' and should endorse *such entry on the deed of transfer; and [*181 that, for every such entry and endorsement, the company should be entitled to 2s. 6d; and that such deed, so endorsed, should be sufficient evidence of the consent of the court of directors.

" 11. That the person or persons proposing to make any transfer of shares, or the person or persons to whom the same was proposed to be made, should, seven days at the least before the making or executing any such transfer, deliver to the court of directors at the head banking house aforesaid, a notice in writing specifying the number of shares proposed to be transferred, and the name or names, residence, or rank, profession, or trade, and, if representatives, their character or title as such, as well of the person or persons so proposing to transfer, as of the person or persons to whom such transfer was proposed to be made, and the price or consideration (if any) proposed to be given for the same.

" 13. That the court of directors should prescribe the form of the transfer of the shares; and that every purchaser or transferee of shares should, in respect of the shares purchased by or transferred to him, and at his own expense, when required by the said court, execute this or any supplementary deed or deeds, and enter into any such covenant with the company to observe, fulfil, and perform all the clauses, conditions, and stipulations therein contained, as by the said court should be required.

" 16. That, upon every sale or transfer of shares, or change of proprietorship therein, the then existing certificate should be given up to be cancelled, and should forthwith be cancelled accordingly, and that a new certificate should be given to the new proprietor, in respect of the shares transferred to or taken by him; and that, if any of the shares included in the certificates so given up should be retained by the old proprietor, a new *certificate in respect thereof should be issued [*182 to him without any other fee than that paid on the transfer; and that the production of any certificate should at all times be good *prima facie* evidence of the title of the person holding the same as proprietor of the shares therein mentioned."

The practice of the bank as to transfers of shares therein was as follows:—They prescribed a form, and had it printed in blank. This form was generally filled up by the bank; and, if so filled up, there was nothing put upon the transfer to show that it had been so filled up. The bank, however, sometimes gave out the blank printed forms of the transfers to the brokers, to be filled up by themselves; and the transfers in this case were in such forms.

It was not a matter of course that the consent of the directors should be given: but it was never refused.

The notice mentioned in the eleventh clause was not generally required by the bank: and they never refused to register a transfer in consequence of its omission.

Russell bought sixteen of the twenty shares of one Wadeson, a broker; and he sold them as broker of William Barnett. It was Wadeson's duty to deliver to Russell a transfer duly executed by Barnett of the said sixteen shares. Wadeson on the 15th of September applied to the bank to prepare a transfer of the said sixteen shares to the defendant. This application was refused by the bank.

There was no other evidence of any refusal by the directors to consent to a transfer of the shares in question; and no evidence of consent on their part to such transfer. Wadeson afterwards, on the same day, obtained a blank printed form, and filled it up himself, and got it executed by Mr. Barnett.

The bank refused a number of applications made to them after the 3d of September to allow transfers. *They, however, allowed *183] and registered two or three transfers after the 3d of September.

The secretary of the bank stated that it was not a matter of course to register transfers on production at the bank of the papers duly executed; but that he was not aware of any refusal to do so.

On the 15th of September, the plaintiffs, according to the ordinary practice of the Stock Exchange, passed the defendant's name to Mr. Russell, as the buyer of twenty shares; and, in due course, according to the same practice, Mr. Russell tendered to the plaintiffs twenty shares in the said bank, and transfers thereof in the prescribed form, duly executed and stamped,—sixteen certificates being in the name of William Barnett, with a transfer from him, and four in the name of Rear Admiral Robert Aitcheson, with a transfer from him. On such tender, the plaintiffs were bound by the ordinary practice of the Stock Exchange to pay to Mr. Russell 640*l.* for the purchase-money, and 3*l.* 10*s.* for the stamps impressed on the said transfers.

The plaintiffs, in order to try and save the defendant, though at the risk of being declared defaulters, at first refused to pay Mr. Russell for the shares; and he thereupon summoned them on the same day before a committee of the said Stock Exchange, who considered the circumstances of the case, and determined that the plaintiffs were bound to pay for the shares. Russell thereupon again tendered the certificates and the transfers, and the plaintiffs paid him 643*l.* 10*s.* for the same.

The plaintiffs' commission for making the purchase is 5*s.* per share, making 5*l.* for the twenty shares. The certificates of shares were genuine, and the transfers were in the ordinary form. There were sixteen certificates of shares in the name of William Barnett, all in the *184] same form, but numbered respectively 1021 to 1036, *both inclusive. The following is a copy of one of the certificates:—

"The Royal British Bank

"No. 1021.

"London, the 27th day of March, 1855.

"This is to certify that William Barnett, National Debt Office, Old Jewry, gentleman, is the proprietor of one share of 100*l.* in the Royal British Bank, on which 50*l.* have been paid up.

"ED. ESDALE,

"R. PADDISON, Secretary."

"Pro Gen^l. Manager."

The following is a copy of the transfer from the said William Barnett:—

"I, William Barnett, of the National Debt Office, Old Jewry, city, gentleman, in consideration of the sum of 512*l.* paid to me by Frederick Stray, of 40, Haymarket, tailor, do hereby transfer to the said Frederick Stray sixteen shares numbered 1021 to 1036, both inclusive, in the business of the corporation called The Royal British Bank, To hold unto the said Frederick Stray, his executors, administrators, successors, and assigns, subject to the several conditions on which I held the same at the time of the execution hereof: And I, the said Frederick Stray, do hereby agree to take the said sixteen shares subject to the same conditions. As witness our hands and seals this 18th day of September. in the year of our Lord 1856.

"WILLIAM BARNETT. (seal)

"—————(seal)

**"Signed, sealed, and delivered
by the above-named William
Barnett, in the presence of**

"WILLIAM WADESON,

"of 76 Old Broad Street, stock-broker.

**"Signed, sealed, and delivered by the
above-named ————— in
the presence of**

***The other transfer was of four shares, and was in the same form, excepting that the transferror was Rear Admiral Robert Aitcheson, of Shrubs Hill, Lyndhurst, Hampshire; and the consideration was stated to be 128*l.*; and the date was the 16th of September, 1856.**

There were also four certificates of shares in the same form as the above, but in the name of the said Rear Admiral Robert Aitcheson.

The said William Barnett and Rear Admiral Robert Aitcheson were respectively registered shareholders of the above-mentioned shares.

On the 19th of September, 1856, the plaintiffs wrote to the defendant a letter of which the following is a copy:—

"2, Capel Court. 19th September, 1856

"Dear Sir,—We yesterday had stamped transfers and certificates of the twenty Royal British Bank shares purchased for you on the 28th

of August of Mr. Russell, presented to us for payment by him, and have been under the necessity of paying, according to the laws of our Stock Exchange, on your account, the purchase-money, 640*l.*, with stamps 648*l.* 10*s.*, and with our commission 5*l.*, making together 648*l.* 10*s.*, which we request you to pay the bearer, who will hand you the shares, or to forward us the same immediately, otherwise we shall require interest to be paid thereon from this date.

“TAYLOR & ASTON.

“To FREDERICK STRAY, Esq.”

This letter was delivered to the defendant on the same day, by a clerk of the plaintiffs, who took with him the shares and transfers.

At the close of the plaintiffs' case, the following objections were urged on the part of the defendant,—first, that the directors of the Royal British Bank had refused to consent to the transfer tendered to the *186] defendant before *the plaintiffs paid their money; and that it was the plaintiffs' duty to procure such transfer,—secondly, that the transfers were not in the name of Russell, but in the names of other parties; and that Russell had not at the time of the contract, or at any subsequent time, any shares in the bank.

The learned judge declined to nonsuit the plaintiff, but reserved the points; and a verdict was found for the plaintiffs, the counsel for the defendant not addressing the jury, nor requiring any point to be left to them, but relying upon the above objections.

Knowles, Q. C., in Michaelmas Term last, in pursuance of the leave reserved to him, obtained a rule nisi to enter a verdict for the defendant, on the grounds urged by him at the trial. He referred to *Hibblewhite v. M'Morine*, 6 M. & W. 200,† and *Wilkinson v. Lloyd*, 7 Q. B. 27 (E. C. L. R. vol. 53).

Atherton, Q. C., and *Aston*, showed cause.—The defendant by this rule seeks to have the verdict entered for him upon two grounds,—first, that the directors had refused to consent to the transfers tendered to the defendant before the plaintiffs paid the money, and that it was the duty of the plaintiffs to procure such transfers,—secondly, that the transfers were not in the name of Russell, but of other parties, and that Russell had not at the time of the contract, or at any subsequent time, any shares in the bank.

1. The first point does not properly arise; for, the defendant having refused to accept any shares, the time never arrived at which the directors could accept or reject the transferee. Before the directors could be called upon for their consent, a formal transfer must be executed by the transferor, and assented to by the transferee.

*187] Assuming, however, that that point does *arise, the question is upon what terms the plaintiffs and defendant dealt,—whether or not it was part of the bargain that the consent of the directors should be obtained. The evidence clearly established that sales of shares on

the Stock Exchange were not subject to the approval of the directors; but that all that the broker is bound to do, is, to obtain a transfer of the required number of shares at the price and within the time stipulated. It also appears that the buying broker is by the rules of the Stock Exchange bound, on pain of expulsion, to pay the price to the selling broker on the settlement day. *Wilkinson v. Lloyd*, 7 Q. B. 27, therefore, has no bearing upon the present case. [WILLES, J.—The mere fact that the buying broker is liable to be expelled for non-compliance with the regulations of the Stock Exchange, might not be sufficient for a court of justice: but here the plaintiffs were under a liability to Russell. The 10th and 11th clauses of the deed of settlement show that the consent of the directors is mere matter of form, and cannot be withheld.]

2. Then as to the second point, the question is, whether, having made the contract of the 28th of August, 1856, with Russell, and having communicated that to the defendant, the plaintiffs were bound to obtain a transfer of the stipulated number of shares from Russell, or whether the contract was not satisfied by their obtaining through Russell a transfer from some third party. The evidence was, that it is the invariable practice of the Stock Exchange not to take the transfer from the broker, but to accept as a performance of the contract any shares that can be obtained within the time. [WILLES, J.—That is perfectly well known.] The practice is recognised in *Sutton v. Tatham*, 10 Ad. & E. 27 (E. C. L. R. vol. 37), 2 P. & D. 308, where Lord Denman, C. J., and Littledale, J., lay it down that a person who employs a broker *on the Stock Exchange impliedly gives him authority to act in accordance with [*188 the rules there established, though such principal may himself be ignorant of the rules. *Pollock v. Stables*, 12 Q. B. 765 (E. C. L. R. vol. 64), 5 Railw. Cas. 352, is an authority to the same effect. *Hibblewaite v. M'Morine*, 5 M. & W. 462,† disposes of the objection. It was there held, that a contract for the sale of goods, to be delivered at a future day, is not invalidated by the circumstance that at the time of the contract the vendor neither has the goods in his possession nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them by the time appointed for delivering them, otherwise than by purchasing them after making the contract. The plaintiffs, having performed their contract in buying the securities they were instructed to buy, are clearly entitled to recover the money paid by them in pursuance of it, and do not impliedly covenant for title: *Lamert v. Heath*, 15 M. & W. 486;† *Bosanquet v. Shortridge*, 4 Exch. 699;† *Westropp v. Solomon*, 8 C. B. 345 (E. C. L. R. vol. 65).

Knowles, Q. C., Maude, and Gibbons, in support of the rule.—The contract was for the purchase from Russell of shares in the Royal British Bank. Unless Russell tendered to the plaintiffs a valid transfer, they were under no obligation to accept the shares or to pay the

money, and consequently could have no right to call upon the defendant. Now, the 23d section of the 7 & 8 Vict. c. 113, which authorizes the transfer of shares, requires that such transfer shall be made "subject to the provisions of the deed of settlement;" and the 10th clause of the deed of settlement expressly requires it to be done "with the consent of the court of directors." Without such consent, therefore, a transfer would be inoperative: the pretended transferror would still *remain a shareholder: *Bosanquet v. Shortridge*, 4 Exch. 699,†—the decision of the Court of Exchequer in which, so far as this question is concerned, not being at all affected by the judgment of the House of Lords in *Bargate v. Shortridge*, 5 House of Lords Cases, 297. The principle upon which alone this action is maintainable, is thus stated by Tindal, C. J., in *Bowlby v. Bell*, 3 C. B. 284, 293 (E. C. L. R. vol. 54),—"In order to maintain this action for money paid to the use of the defendant, at his request, it was necessary that the plaintiff should prove either an actual request on the part of the defendant, or that the money was paid in discharge of some liability which the plaintiff had taken upon himself by the defendant's authority." *Wilkinson v. Lloyd*, 7 Q. B. 27, is very much in point. There, the plaintiff agreed to purchase of the defendant shares in a mining company established under a deed of settlement, and sent a form of transfer to the defendant for his execution. The deed required, that, on transfer of shares, the intended proprietor should be approved of by the directors. The defendant executed and returned the transfer, and sent also a certificate (according to the provisions of the deed) verifying the defendant's title to the shares. The plaintiff, on receiving the transfer, paid for the shares; but, before such payment, the directors passed a resolution (unknown to the plaintiff till after the payment) stating that the defendant had commenced an action against the company, and that no transfer of shares standing in his name should be allowed while such action was pending. The directors never objected to the plaintiff as a proprietor; and the defendant denied their power to stay a transfer on the ground above stated. While the transfer was suspended, the shares fell in the market, and the plaintiff brought assumpsit for money had and received, to recover back the purchase-money: and it was held that the action lay; for *that the defendant, as vendor, was bound to obtain the assent of the directors, and to do all that was necessary to vest the shares in the plaintiff. That case shows that the plaintiffs may recover back the money they have paid to Russell. The case of *Sleigh v. Sleigh*, 5 Exch. 514,† is also very analogous. It was there held that the drawer of an accommodation bill cannot sue the acceptor for money paid to his use to the holder of the bill, unless not only the money paid pro tanto discharged the liability of the acceptor, but also the payment was made at his request, either express or implied. Therefore, where the plaintiff drew

and endorsed for the accommodation of the defendant, the acceptor, a bill of exchange, which, when due, was dishonoured, and the plaintiff, without having received notice of dishonour, and without any request from the plaintiff, paid a part of the bill to the holder,—it was held that he could not recover the amount from the defendant in an action for money paid to his use,—there being no implied undertaking to indemnify against a payment which the drawer voluntarily made, with full knowledge that he was not bound to pay. [CROWDER, J.—Here, the plaintiffs enter into a contract at the request of the defendant: you are, in effect, seeking to imply an agency different from the ordinary course of the business which the parties are engaged in.] There was no evidence of a course of business applicable to a case like this,—where a tender of shares was made after the failure of the bank. Besides, the course of business on the Stock Exchange is not binding on the court: *Child v. Morley*, 8 T. R. 610. The consent of the directors to the transfer was clearly necessary: *Parnter v. Gaitskell*, 13 East, 482: and it was the seller's duty to procure it. This is like the case of a covenant in a lease, not to assign without the consent of the lessor; in which case it is the vendor's duty to procure such consent: *Lloyd v. *Crisp*, 5 Taunt. 249 (E. C. L. R. vol. 1); [*191 *Mason v. Corder*, 7 Taunt. 9 (E. C. L. R. vol. 2). As to the resolution of the Stock Exchange committee, of the 11th of September, 1856, that clearly had no binding force upon persons not members of that body: *Westropp v. Solomon*, 8 C. B. 345 (E. C. L. R. vol. 65.) [CROWDER, J.—All that that resolution amounts to, is, that the committee declined to interfere in the matter.] This contract was in writing,—it was a contract for twenty shares bought of Russell. [CRESSWELL, J.—They are not stated to be Russell's shares. WILLES, J.—Besides, the note sent to the defendant was not the contract.] It must be conceded that it cannot be put higher than a statement of the contract sent by the plaintiffs to the defendant.

CRESSWELL, J.(a)—I am of opinion that the rule for a new trial for this case must be discharged. This is an action for money paid by the plaintiffs to the use of the defendant; and the question is whether the plaintiffs had any authority, express or implied, to pay the money on his behalf. It appears that the plaintiffs were employed to purchase for the defendant on the Stock Exchange shares in a chartered joint stock bank, and that, according to the usage of the Stock Exchange, he bought the required number of shares of another broker there: and it was proved, that, by the rules of that establishment, it is incumbent on the buying broker to pay the amount of the purchase-money on the day specified to the selling broker upon the transfers being tendered to him, and that the plaintiffs did pay the money accordingly. It was further proved that the plaintiffs had on former occasions been employed by the

(a) Cockburn, C. J., was absent, on account of indisposition.

defendant to buy shares for him in that market. He must, therefore, be taken to have given them authority when he employed them to deal *192] according to the course and practice of the *market. Having at the defendant's request purchased the shares for a future day, the plaintiffs did all that was requisite to entitle them by the usage of the Stock Exchange to complete the transaction; and therefore they had an implied authority from the defendant to pay the money for him on that day. I do not think it necessary to deal with the resolution of the committee of the Stock Exchange, because, if we find the plaintiffs buying shares according to the course of business of the market to which the defendant sends them, and advancing their money in pursuance of that course of business, although the transaction ultimately fails otherwise than through any default on their part, they clearly are entitled to recover from their principal the money so paid. If the principal fails to obtain the consideration for which the money was paid, he must resort to the party from whom the purchase was made, and not to his own brokers. Suppose, instead of impliedly authorizing his brokers to pay the money for him, the defendant had drawn a check for the amount, could he afterwards have brought an action against his brokers because the transaction turned out a failure? I think that is very like this case. It is said that the deed of settlement requires notice of an intended transfer to be given to the directors. But that notice may be given by either party, and it is not of necessity part of the transaction. The directors may waive it. But, before there can be a perfect transfer, there must be a deed executed by both parties, the seller professing to convey the shares upon certain terms and conditions to the buyer, and the latter under his hand and seal accepting the shares subject to those conditions: and, when the directors by their officer accept the transfer and enter a memorial thereof on the register, the transferee is bound to observe all the conditions to which the shares are subject. Now, the seller could not get the transfer accepted by the directors until the *193] *purchaser had given the name to be filled in. That the defendant in this case refused to do. He therefore failed to do that which it was necessary and incumbent on him to do to enable Russell to do anything more than he did. The only question upon which I have entertained any serious doubt, is, whether Russell could be said on the 15th of September to have tendered the things he contracted to sell, the bank having stopped payment. He had contracted to sell and deliver shares in an existing bank; and the shares he delivered were shares in a bank which had suspended payment. Upon consideration, however, I think that objection cannot prevail. The Royal British Bank is a chartered bank; and, though it had at this time stopped payment, there was nothing to prevent its going on again. I think, for the purpose now in question, the bank must now be assumed to be still existing, and that the shares tendered, though greatly reduced in value,

were the things contracted for. It seems to me, therefore, that there has been no failure on the part of the plaintiffs to do that which they were employed to do; and that, having paid the money in pursuance of a liability which they had incurred through the defendant's instructions, they are entitled to recover it back. Another point was made, as to the names of the transferrors, founded upon the supposed authority of *Hibblewhite v. M'Morine*. But the foundation for that objection fails, inasmuch as the contract was not for the transfer of shares standing in Russell's name. I therefore think the rule must be discharged.

CROWDER, J.—I also am of opinion that this rule should be discharged. The question is whether the plaintiffs are entitled to recover the sum paid by them as the purchase-money of the shares and their commission. It appears that the defendant employed the plaintiffs to go upon the Stock Exchange and buy for *him twenty shares in [*194 a joint stock bank. It must be taken, therefore, that he authorized them to deal according to the usual course of brokers in that market. Being so authorized, it seems the plaintiffs entered into a contract to purchase the required number of shares of one Russell, also a member of the Stock Exchange. On the day on which by the ordinary course of business on the Stock Exchange the transfer deed was to be delivered, such deed was tendered by Russell to the plaintiffs, and they, according to the usage, paid him the agreed price. The conduct of the plaintiffs was in strict accordance with the authority given to them by the defendant, provided the thing tendered was that contracted for: and hence arises the only question about which there could be any doubt, viz. whether, the bank having stopped payment before the shares were tendered, the payment was made in respect of that which the plaintiffs were authorized by the defendant to purchase for him. It appears to me that it was. It was contended, that the bank having stopped payment on the 3d of September, the shares tendered on the 15th were not what the defendant had authorized the plaintiffs to purchase for him, viz. shares in an existing bank. But non constat that the bank might not have gone on again. Assume that the shares are now utterly valueless, they were not so then: and, if they were, it matters not; they were that which the plaintiffs were instructed to buy. As to the consent of the directors to the transfer of shares, it was no part of the plaintiffs' duty to obtain that. Besides, the time for obtaining such consent never arrived, the defendant having declined to take the shares or to give a name. The objection that the contract could only be performed by a transfer of shares from Russell, was not very much pressed. There was no contract between the defendant and Russell: the only contract was that which appeared in the respective brokers' *books: and the memorandum sent to the defendant did [*195 not represent a contract for the purchase of shares belonging to

Russell, but for the purchase of twenty shares from Russell, which would be performed by the delivery of any shares.

WILLES, J.—I am of the same opinion. The practice of the Stock Exchange appears to be this,—that the broker who buys shares should pay the price to the selling broker upon a transfer being tendered to him with the shares on the settling day. It further appears not to be the duty of the broker to get the transfer registered. All he has to do, is, to accept the transfer and pay the money. If it should afterwards turn out that the transfer cannot, in consequence of the directors not having given their consent, or for any other reason, without any default on the part of the buyer, be completed by registration, it may be that an action would accrue to the buyer to recover back his money, but not from the brokers who paid it in accordance with the terms of the contract, the practice of the Stock Exchange, like that of any other market, being imported into and forming part of the bargain. This differs from the ordinary case of a sale, inasmuch as the seller gets the money before the arrival of the period when the thing sold is effectually conveyed to the purchaser. But that does not follow from the application of any different rule of law to this case from that which governs others, but from the peculiar nature of the brokers' engagements upon the Stock Exchange. It might as well be said, that, if the two principals had themselves met, and had agreed that the shares should be paid for on the day preceding that upon which the transfer was to be handed over, that circumstance would require the application to this case of a different rule of law from that which applies to contracts of sale generally. The rule applicable to this case is the rule *196] which pervades the whole law of principal and agent, *viz. that the principal is bound to indemnify the agent against the consequences of all acts done by him in pursuance of the authority conferred upon him. It appears, that, for some reason which at first I did not understand, but of which I now perfectly well see the drift, the directors had refused to consent to a transfer of the shares in question to the defendant. If there had been an absolute refusal on the part of the directors to recognise a transfer, and that had been known to the plaintiffs at the time they paid the money, whatever the reason for that refusal might have been, the subsequent payment might have been a payment by the plaintiffs in their own wrong. But, when the evidence is looked at, it appears that all the refusal of the directors amounted to, was, a refusal to *prepare* a transfer. It seems, that, after the 3d of September, the day on which the bank stopped payment, the directors, except in one or two instances, did not allow any new name to be placed upon the register. No doubt, the directors found the shareholders anxious to evade responsibility, and they naturally would refuse to receive transfers to men of straw. When the payment in this case was made, nothing appeared to show that the transfer was neces-

early void by reason of the directors having exercised their discretion in refusing to consent to the transfer being made to the defendant. Therefore the plaintiffs, who had at the implied request of the defendant made themselves responsible for the payment of the money at a stage preceding that on which the consent of the directors could be asked for, having acted rightly at the time, are entitled to call upon the defendant to reimburse them. I by no means say, that Mr. Stray could make out a case against the seller of the shares, on its appearing that the money was paid before the time when the completion of the transaction was to take place. To entitle him to maintain such an action, he must have been prepared to show a readiness to do everything necessary on his part for the purpose *of arriving at the [197 completion. I am at a loss to conceive how the conclusion could be arrived at that he was ready to accept the transfer, seeing the state of the concern at the time. I express no opinion upon it, but I merely throw out these hints to show that it is by no means clear that the defendant could recover back the money even from the seller of the shares. For these reasons, it appears to me, that, upon the first and principal ground, the rule ought not to be made absolute. As to the suggestion that the defendant was entitled to have a transfer of twenty shares in the name of Russell,—it appears that that is contrary to the practice of the Stock Exchange. And, when the note of the contract is looked at, the objection is disposed of; for, that does not describe the shares agreed to be sold as shares belonging to Russell.

Rule discharged.

Against this decision the defendant appealed, pursuant to the 35th section of the Common Law Procedure Act, 1854.

The question for the opinion of the court of error, was, whether the judgment of the Court of Common Pleas in discharging the rule was or was not correct. If it was, the judgment for the plaintiffs was to stand, with interest, according to the statute. If the judgment was incorrect, the court of error was to give such judgment as ought to have been given by the Court of Common Pleas.

The case was argued in the Exchequer Chamber on the 18th of June, before Lord Campbell, Lord Chief Baron Pollock, Coleridge, J., Erle, J., Crompton, J., and Bramwell, B., when the court, without hearing the counsel for the respondents, affirmed the judgment of the court below with costs.

Judgment affirmed.

***198] *In the Matter of ELIZA, the Wife of JOHN HAIGH.**
April 17.

The husband being a minor, the court granted a rule under the 3 & 4 W. 4, c. 74, to enable the wife to execute a conveyance of her separate property without his concurrence.

KAYE moved for an order under the 3 & 4 W. 4, c. 74, to enable Eliza, the wife of John Haigh, by deed or surrender to convey or dispose of certain freehold property at Thrapston, in the county of Northampton, which had been bequeathed to her for her separate use by the will of one Anne Hogg.

The motion was founded upon the affidavits of the husband and of the wife, from which it appeared that the former was under the age of twenty-one, and that they were desirous of raising a sum of 250*l.* by mortgage of the property in question, but, by reason of the infancy of the husband, the wife was unable to execute a valid conveyance for securing the same. The learned counsel referred to the 77th and 91st sections of the act.

COCKBURN, C. J.—The case falls within the words of the 91st section,—“if a husband shall, in consequence of being lunatic, idiot, or of unsound mind, or *shall from any other cause be incapable of executing a deed:*” therefore, if a purchaser or a mortgagee is willing to accept the title, valeat quantum, he may do so. Being an infant, the husband cannot execute a valid deed.

The rest of the court concurring,

The rule was granted,—“it appearing to the court by affidavit that the said John Haigh is incapable of executing a deed by reason of his being an infant under the age of twenty-one.”

***199] *TINDALL v. HIBBERD.** *April 23.*

A certificate granted by a commissioner in bankruptcy to a petitioning trader, under s. 221 of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, operates a discharge as to the debts of all persons who were creditors at the date of the petition, and who had notice of the several sittings of the court under it, and is not affected by the refusal of one creditor to receive the composition agreed on by the three-fifths.

THIS was an action for money payable by the defendant to the plaintiff for work and services done and rendered by the plaintiff for the defendant at his request, and for commission and reward due and payable from the defendant to the plaintiff in respect thereof, and for money lent by the plaintiff to the defendant, and for money paid by the plaintiff for the defendant at his request, and for money found to be due from the defendant to the plaintiff on accounts stated between them: and the plaintiff claimed 55*l.* 14*s.*

Plea, that, after the accruing of the debt and claim in the declaration

mentioned, the defendant, being a trader within the Bankrupt Law Consolidation Act, 1849, was also indebted to divers other persons in divers other sums of money, and was unable to meet his engagements with them, and he thereupon, being so indebted, and so unable to meet his said engagements, after the passing of the said act of parliament, duly made an arrangement with his creditors under the superintendence and control of the court of bankruptcy, in pursuance of the said act, and filed such petition, and did all such matters and things as are required by the said act in that behalf; that such sittings were appointed and held as required by the said act in that behalf, and such orders made, and such notices given, and all such matters and things done, as required by the said act in that behalf; that three-fifths in number and value of the creditors of the defendant who had proved their debts to the amount of 10*l.* and upwards did at the second sitting agree to the proposal made by the defendant at the first sitting, such sittings being duly held in pursuance *of the said act; that such [*200 proposal was then reduced into writing and signed by the said creditors; that afterwards the said court of bankruptcy did, after hearing such parties as are in and by the said act mentioned in that behalf, approve and confirm the same, and caused it to be filed and entered of record in pursuance of the said act; that, afterwards, and before the commencement of this action, the said court did, in pursuance of the said act of parliament, grant to the defendant such certificate as in the said act of parliament in that behalf mentioned, setting forth therein the petition of the defendant, the agreement of the creditors, and that the same had been fully carried into effect; *that all things had been done and happened to make the said certificate valid and effectual to discharge the defendant from his debts owing at the time of filing his said petition*; and that, by virtue of the said certificate, and by force of the said statute, the defendant became and was before the commencement of the action discharged from the said debt and claim in the declaration mentioned.

Replication,—that the said proposal in the plea mentioned, and which was agreed to at the said second sitting therein mentioned, was made on the 22d of December, 1855, and was, that the defendant should pay the costs and expenses of the said arrangement, and also on or before the 5th of April then next should pay to his creditors the sum of 5*s.* in the pound on the amount of their respective debts; that the defendant did not pay to him the plaintiff the said sum of 5*s.* in the pound on the amount of his the plaintiff's said debt; *that the said resolution and agreement had not been carried into effect; and that the plaintiff, so being such creditor of the defendant, had not been satisfied according to the tenor of the said proposal and agreement.*

*Rejoinder,—that the defendant did on or before the said 5th [*201 of April in the replication mentioned, being next after the mak-

ing of the said proposal, *tender and offer to pay to the plaintiff the said sum of 5s. in the pound* on his, the plaintiff's, said debt, *which the plaintiff then refused to take or receive*; that such tender and offer were duly made by the defendant in performance of the said proposal and resolution and agreement as far as the plaintiff's said debt was concerned, as he the plaintiff well knew at the time when such tender and offer were made to him; and the defendant said that the said proposal and resolution and agreement was in all other respects fully performed by him, *and that he had always been ready and willing to pay to the plaintiff the said amount of 5s. in the pound on his the plaintiff's debt since the said refusal by the plaintiff of the same.*

The plaintiff joined issue on the rejoinder; and for a second surrejoinder thereto the plaintiff said, that, *after the alleged tender, and before action, the plaintiff demanded of and requested the defendant to pay to him the said sum of 5s. in the pound on the plaintiff's said debt, and the defendant then wholly refused, and from thence hitherto had wholly refused, to pay the same or any part thereof.* He also demurred to the rejoinder, the grounds of demurrer alleged in the margin being,—
 “1. That it (the rejoinder) is a departure from the plea, which must be understood as alleging that the resolution and agreement was carried into effect, and the rejoinder sets up an excuse for not doing so,—2. That the composition should have been brought into court either on the plea or rejoinder,—3. That it should have been shown that it was paid into the bankruptcy court for the plaintiff.”

The defendant took issue upon the second surrejoinder, and joined in demurrer: and, for a second rebutter **to the plaintiff's second*
 *202] surrejoinder, he said *that the demand in the said second surrejoinder mentioned was made after and not before the granting by the said court of bankruptcy of the certificate in the second plea mentioned, and after and not before the defendant was by force of the said certificate discharged as in that plea mentioned from the debt in the declaration mentioned.* He also demurred to the second surrejoinder, the ground of demurrer stated in the margin being,—“that the demand and refusal cannot revive a debt which has been discharged; and that, to give it any effect, it ought to have appeared that it took place before the debt was discharged by the certificate.

The plaintiff joined in demurrer, and also demurred to the defendant's second rebutter, the ground of demurrer alleged being,—“that it is immaterial whether the demand was before or after the certificate, as the plaintiff's refusal of the tender and the certificate did not discharge the defendant from payment of the composition.” Joinder.

*203] *Hugh Hill*, in support of the demurrer.(a)—The **questions* presented for the consideration of the court in this case, turn

(a) The points marked for argument on the part of the plaintiff, were as follows:—

“1. That it was a condition precedent to the certificate mentioned in the plea operating to

upon the construction of the clauses in the Bankrupt Act, 12 & 18 Vict. c. 106, which relate to arrangements between debtors and their creditors under the superintendence and control of the court. The 211th section enacts, "that any such trader unable to meet his engagements with his creditors, and desirous of laying the state of his affairs before them, under the superintendence and control of the court of bankruptcy, and of submitting himself to the jurisdiction of the court, in manner hereinafter mentioned, may present a petition to the court, setting forth the true cause of such inability, and praying that his person and property may be protected from all process until further order; and the court, on such petition, shall have power to grant such protection, and may renew the same from time to time, as it shall think fit, and, if the petitioner be in prison or in custody for debt, may, except in the cases next hereinafter mentioned, order his immediate release, either absolutely or on condition, and may take bail for his attendance at the several sittings of the court *hereinafter mentioned." [*204 Then follows an enumeration of the cases in which the debtor's release shall not be ordered. The 212th section gives the form of the petition and affidavit. The 213th section enacts, "that, forthwith after the granting of any order for protection, the court shall appoint a private sitting to be held at such time and place as it may name, and shall at the same time appoint an official assignee to act in the matter of such petition, and, upon sufficient cause shown, may, if it shall think fit, direct that the estate and effects of the petitioner, or any part thereof, shall be possessed and received by such official assignee, or be taken possession of by the messenger of the court; and all stocks, moneys, and other effects of the petitioner shall be transferred, delivered, and paid by the official assignee into the Bank of England to the credit of the accountant in bankruptcy, to be subject to the like rule and regulation for the keeping the account of the said moneys and other effects, and for the payment and delivery in, investment, and payment and delivery out of the same, as in bankruptcy; and the court

discharge the defendant from the debt sued for, that the plaintiff should have been satisfied according to the tenor of the resolution, and that he was not satisfied merely by the money being tendered to him: 2. That, to render such tender an available excuse for not satisfying the plaintiff, the defendant should have been always ready to pay the money, and should have brought it into court; and the plaintiff did not lose his right to the sum tendered, by refusing to receive it: 3. That the plaintiff is entitled to recover the composition, he not having been paid it: 4. That the certificate affords no evidence that the plaintiff has been satisfied, and does not estop him from claiming the composition: 5. That the rejoinder departs from the plea, since the plea must be understood as alleging that the plaintiff was satisfied according to the resolution, and the rejoinder sets up an excuse for not having satisfied him: 6. That the excuse is not sufficient, as it does not show that the defendant has always since been ready to pay the composition, or that he brings it into court: 7. That the plea alleges that the whole debt is barred, and the rejoinder only that 15s. in the pound is barred, since, notwithstanding the tender, the plaintiff is entitled to sue for the composition as part of his original claim: 8. That the second surrejoinder is good, as the demand, whether before or after the certificate, put the defendant in default, and entitled the plaintiff to sue for the composition, if not for his whole debt: 9. That the second rebutter is bad, because it was immaterial whether or not the demand was made before or after the certificate."

shall have power to examine on oath such petitioner, or any witness produced by him, or any creditor or person claiming to be a creditor of such petitioner, and to adjourn such private sitting, or any subsequent private sitting, from time to time as it shall think fit; and notice of such private sitting shall be given in writing to every creditor not less than fourteen days before the same is held, such notice to be sent by post, addressed to every creditor at his last known place of business or residence." The 214th section enacts that such petitioning trader shall, ten days before the day appointed for the private sitting of the court, file in court a full account of his debts, and the consideration thereof, and the names, residences, and occupations of his creditors, and also a full account of his estate, &c., and shall therein set forth such proposal

*205] *as he is able to make for the future payment or the compromise of such debts or engagements, and shall furnish the official assignee with a copy of such account." The 215th section enacts,

"that, at the private sitting of the court appointed in manner hereinbefore mentioned, or at any adjournment thereof, the creditors shall prove their debts (such proofs to be in all respects as proofs in bankruptcy), and the petitioning trader shall attend, and make oath of the truth of the account filed by him, and may be examined thereon; and if at such sitting, or at any adjournment thereof, three-fifths in number and value of the creditors who have proved debts to the value of 10*l*. shall assent to the proposal of such petitioner, or to any modification thereof, the court shall appoint another private sitting for the confirmation of such proposal or modified proposal, and such second sitting shall be held not earlier than fourteen days from the first sitting, and notice thereof in writing shall be personally served on every creditor who was not present by himself or his appointed agent at such first sitting seven clear days at least before the day appointed for such second sitting: provided always, that the court, if it shall think fit, may make order in any special case that service of such notice at the last known place of abode or business of any creditor shall be deemed good service."

The 216th section enacts, "that, at such second sitting, or at any adjournment thereof, the creditors may also prove their debts, and, if three-fifths in number and value of those who have proved debts to the amount of 10*l*. shall agree to accept such proposal as was assented to at the first sitting, the terms thereof shall be reduced into writing, and the creditors shall sign the same; and such resolution or agreement (subject to such confirmation as is hereinafter mentioned) shall thenceforth be binding and of full force, as well against such petitioning trader

*206] as against all persons who were creditors at the *date of his petition, and who had notice of the said several sittings of the court; and the court, if it shall think the same reasonable and proper to be executed, after hearing such creditors, by themselves, their counsel or attorneys, as may desire to be heard either for or against such resolution

or agreement, shall approve and confirm the same, and cause it to be filed and entered of record, and shall grant to the petitioner a certificate of the filing and entering of record of such approval and confirmation, and shall from time to time endorse on such certificate a protection from arrest; and such petitioner shall be free from arrest at the suit of any person being a creditor at the date of his petition, and having had such several notice or notices aforesaid; and any officer arresting such petitioner at the suit of any such creditor, and on sight of such certificate and protection not releasing such petitioner, shall be liable to such penalty as is provided respecting bankruptcy in the like case, &c. The 218th section provides for the vesting of the estate and effects of the petitioning trader from and after the date of the approval and confirmation of such resolution or agreement. And the 221st section enacts, "*that, so soon as the said resolution or agreement shall have been carried into effect, and the creditors of such petitioning trader shall have been satisfied according to the tenor thereof*, the court shall give to such petitioner a certificate under the hand of the commissioner, in the form contained in the schedule A. c. to this act annexed, setting forth the filing of the petition, the resolution or agreement of the creditors, and that the said resolution or agreement has been fully carried into effect; and such certificate shall thenceforth operate to all intents and purposes as fully as if the same were a certificate of conformity under a bankruptcy," except in cases of fraud, &c.

The question is, whether it is not a condition precedent *to the validity of the certificate, that "*the resolution or agreement shall have been carried into effect, and the creditors satisfied.*" [*207 This matter came under the consideration of the Court of Exchequer in *Allcard v. Wesson*, 7 Exch. 753,† where it was held that a plea of a certificate granted by a commissioner in bankruptcy to a petitioning trader, under s. 221, is bad, unless it avers "*that the resolution or agreement has been carried into effect, and the creditors of the trader have been satisfied.*" Pollock, C. B., in giving judgment, says: "We are all of opinion that the plea is bad. One objection was, that the plea did not state that the resolution or agreement was carried into effect, and that the creditors were satisfied. Now, the 221st section of the 12 & 13 Vict. c. 106, enacts that the court shall give the petitioner a certificate '*so soon as the said resolution or agreement shall have been carried into effect, and the creditors of such petitioning trader shall have been satisfied according to the tenor thereof.*' I am therefore clearly of opinion that the plea ought to have contained an averment that the resolution or agreement had been carried into effect, and that the creditors had been satisfied according to the tenor thereof. It was also urged that the plea was bad inasmuch as it did not allege that notice of the first sitting was given to the plaintiff. On that point, it is unnecessary to express an opinion, as the plea is bad on the ground

already mentioned : but I must observe, that, in the clauses with respect to arrangements by deed, there is an express provision that the arrangement shall not be obligatory on creditors until after notice." The case afterwards came before the court of error, who affirmed the judgment of the court below, without, however, expressing any opinion upon the point now under consideration,—their judgment being confined to the point of notice. Here, the plea contains no direct allegation that the

*208] agreement or *resolution had been carried into effect and the creditors satisfied; but there is a general allegation that all things had been done and happened to make the certificate valid and effectual to discharge the defendant from his debts owing at the time of filing his said petition. That is met by the replication, which traverses that the agreement,—which was, to *pay 5s.* in the pound,—had been carried into effect and the plaintiff satisfied. The rejoinder alleges a tender and refusal of the composition, and that the defendant was always ready and willing to pay. Then comes a surrejoinder, that, after the alleged tender, and before action, the plaintiff demanded, and the defendant refused to pay the *5s.* in the pound; to which there is a rebutter, that the demand was made after the grant of the certificate. That raises the question whether a mere tender, without more, amounts to satisfaction, so as to give the Court of Bankruptcy jurisdiction to grant the certificate. The statute says, in s. 221, that, "so soon as the said resolution or agreement shall have been carried into effect, and the creditors of such petitioning trader shall have been *satisfied* according to the tenor thereof," the certificate shall be granted. It does not say that the certificate may be granted if the trader has performed the agreement *cy pres*, or to the satisfaction of the court. [COCKBURN, C. J.—Is the arrangement to be defeated because one creditor obstinately refuses to receive the composition?] The question is whether the condition has been performed. [CRESSWELL, J.—All that was obligatory on the petitioning trader, was, to pay the composition agreed on. Had he not performed that when the the certificate was granted?] No. The creditor must be *satisfied*. [CROWDER, J.—In the ordinary way, by payment, or by tender, which is equivalent.] A mere tender clearly would be no satisfaction: the debtor must at least be always ready and

*209] willing to pay. Nothing short of actual payment of a *composition will discharge the debt: *Cooper v. Phillips*, 1 C. M. & R. 649.† [COCKBURN, C. J.—That is because, in the ordinary case of a composition, nobody is empowered to step in and say that the debt is satisfied. But here, the legislature has said that the debt is gone so soon as the certificate is given.] Only provided the certificate is given in accordance with the provisions of the act. [WILLES, J.—In the case of a tender of amends for a thing done under colour or in pursuance of an act of parliament, the defendant may plead the tender

without bringing the money into court.] That is not the case of a debt, but damages. [WILLES, J.—The party would be a creditor in either case,—in the one for liquidated, in the other for unliquidated damages.] The words of the act here are express: the debt must be satisfied by actual payment of the composition, or, at all events, the debtor must be ready at all times to pay it.

Cleasby, contra, was not called upon.(a)

COCKBURN, C. J.—The 221st section of the 12 & 13 Viet. c. 106, in substance, enacts, that, so soon as the resolution or agreement mentioned in the preceding sections of this branch of the statute shall have been carried into effect, and the creditors of the said petitioning trader shall have been satisfied according to the tenor *thereof, the court of bankruptcy shall give to such petitioner a certificate [*210 under the hand and seal of the commissioner, setting forth the filing of the petition, the resolution or agreement of the creditors, and that the said resolution or agreement has been fully carried into effect; and that such certificate shall thenceforth operate to all intents and purposes as fully as if the same were a certificate of conformity under a bankruptcy,—that is, shall enure as an absolute discharge of the debtor from all debts due to “persons who were creditors at the date of his petition, and who had notice of the several sittings of the court:” s. 216. If a man, not being one of the three-fifths in number and value of the creditors attending and signing the agreement, by obstinately refusing to accept the composition, should have it in his power to render the certificate of no effect, the whole proceeding under the statute would be ridiculous. We cannot put a construction upon the statute which would lead to consequences so absurd. I am clearly of opinion that the certificate in this case was rightly given, and that it operates a complete discharge of the debtor from the debt.

CRESSWELL, J.—I also think this debt was extinguished by the certificate. If it were not so, the *consequence would be, that one [*211 obstinate creditor would, by refusing to receive the composition,

(a) The points marked for argument on the part of the defendant, were,—

“1. That, at the time of the granting of the certificate, the defendant had done all he could do in order to carry the agreement into effect, so that, so far as he was concerned, he had carried it into effect:

“2. That it is not necessary, in order to entitle the debtor to the certificate, that every creditor should accept the composition; otherwise, any one creditor might deprive the debtor of the benefit of the act of parliament:

“3. That, the certificate legally given, the debt was as completely barred as if the plaintiff had accepted the composition; and that the only remedy for the plaintiff afterwards was upon the agreement or composition:

“4. That the demand of the composition, being made *after* the certificate, was too late to prevent the certificate from being effectual: if made *before*, it would have negatived the performance of the agreement on the part of the defendant:

“5. That, the debt being discharged, the defendant could not properly pay money into court: and the validity of the defence could not be affected by the payment of the composition into the court of bankruptcy.”

have it in his power to obstruct the operation of these very beneficial provisions of the statute.

The rest of the court concurring,

Judgment for the defendant

SHEEHY v. THE PROFESSIONAL LIFE-ASSURANCE COMPANY.

A writ of summons issued out of the Court of Queen's Bench in Ireland, after the passing of the 13 & 14 Vict. c. 18, against an incorporated joint stock company duly registered in London, and also carrying on business by one R., an agent in Dublin, was, by leave of the court, pursuant to the practice of the court under the 43 G. 3, c. 53, s. 8, and 13 & 14 Vict. c. 18, s. 9,—served by delivering a copy (with a copy of the order) personally to the Dublin agent, R., and by sending similar copies through the general post office directed to the manager, secretary, and actuary at the company's office in London. An appearance was afterwards entered for the company by the plaintiff, and judgment signed :—

Held, that the judgment so obtained was capable of being enforced by action in the superior courts of England.

In such an action, a plea merely alleging the absence of personal service of any writ or process, is bad.

Whether the 9th section of the 13 & 14 Vict. c. 18, per se gave the Irish court power to order substituted service in such a case,—*quære?* But, at all events, there is nothing in that act to take away the jurisdiction which they previously had under the 43 G. 3, c. 53.

An action will not lie upon an interlocutory and collateral order for costs: the mode of enforcing them is by attachment in the court by which the order is made.

THIS was an action upon a judgment obtained in the Court of Queen's Bench in Ireland.

The first count of the declaration stated, that, on the 16th of February, 1852, the plaintiff, in the Court of Queen's Bench in Ireland, recovered against the defendants the sum of 768*l.* adjudged to be due from them to the plaintiff, and also 27*l.* 18*s.* 11*d.* for damages for the detention thereof, also for his costs and charges in his suit in that behalf expended, whereof the defendants were convicted, as by the record and proceedings thereof remaining in the said court appeared, the same being unreversed and unsatisfied and in full force; whereby the plaintiff claimed the sum of 795*l.* 18*s.* 11*d.*

*212] The second count stated, that, on the 21st of February, 1852, the Court of Queen's Bench in Ireland, by a certain order and decree then by them duly made, did further award and adjudge unto the plaintiff, in a certain proceeding then taken by the defendants before the said court, and in the said suit, upon the said judgment, the sum of 12*l.* 6*s.* 1*d.*, to be paid by the defendants to the plaintiff for his costs and charges by him in such suit in that behalf further expended, as by the said order and decree more fully appeared, and which remained unreversed and unsatisfied and in full force, and of which the defendants had due notice; and whereby the plaintiff claimed the sum of 12*l.* 6*s.* 1*d.*

The declaration also contained a count for interest.

The defendants pleaded,—first, to the whole declaration, never indebted.

Secondly, to the first count, that the defendants were not at any time served with any summons or process issuing out of the said Court of Queen's Bench in Ireland, at the suit of the plaintiff in the action upon which the said judgment in that count mentioned was obtained, and that the plaintiff irregularly, behind the back of the defendants, caused an appearance to be entered for the defendants in the said action, and thereby obtained the said judgment thereon, when the defendants were not within the jurisdiction of the said court, and had not been served with any summons or other process to appear to the said action in which the said judgment was so obtained as aforesaid.

The plaintiff joined issue on the first plea, and replied to the second, that the said action in which the said judgment and decree were respectively obtained, was commenced in the said court, the said court being one of the superior courts of common law in Ireland, after the making and coming into force of a certain act of parliament, &c. (13 & 14 Vict. c. 18), intituled An act for the *regulation of process and practice in the superior courts of common law in Ireland, and that [*213 the said action was duly commenced by writ of summons, and in every respect according to the said statute; and that, after the issuing of the said writ, and whilst it was in force, it was duly made to appear by affidavit to the satisfaction of the said court wherein the said judgment was obtained, that the defendants had not been personally served with the writ of summons issued in the said action, but that the defendants then resided out of the jurisdiction of the court, and could be properly served through or upon a certain agent or representative of the defendants within such jurisdiction; and thereupon the said court, to wit, on the 16th of January, 1852, did order that the writ of summons in the said action should be served by delivering the same, together with a true copy of the said order, unto, and by leaving the same with, one James Wilson Ramsay, therein described as agent in Dublin of the said defendants, and also by delivering true copies of the said order and said writ in a letter in and through the general post office, directed to the London agent of the defendants; and that the plaintiff thereupon in all things complied with the said order, and effected service of the said writ as thereby directed, and afterwards, on the day and year aforesaid, upon due proof of such substituted service as aforesaid by affidavit, the plaintiff, in pursuance of such order, in default of appearance by such defendants in due time, entered an appearance for the said defendants under and by virtue of the said statute, and proceeded thereon in the said action as if the defendants had entered their appearance: that afterwards, on the 4th of February, 1852, the plaintiff filed his declaration in such action, and thereupon afterwards, on the day and year in the declaration mentioned in that behalf, in default

of plea, the said judgment was obtained as therein alleged; that
*214] afterwards an application was made on behalf of the defend-
ants, by attorney and counsel, in the said court, and the said
court was then on behalf of the defendants moved to set aside the said
appearance and declaration filed in the said action, and all subsequent
proceedings thereon; and that, on hearing the said motion, and counsel
on behalf of the plaintiff and defendants, it was ordered by the said
court that the said motion should be and the same then was refused.

Rejoinder to the replication to the second plea,—that the defendants
are, and were at the time of the commencement of the said action in
the said court in Ireland, a corporation aggregate within the true intent
and meaning of the said statute in the replication mentioned, and that
they had not before or at the time of the commencement of the said
action any clerk, treasurer, or secretary within the jurisdiction of the
said court, nor any known or responsible officer or agent, or any agent,
representative, or manager of their real or personal estate within the
jurisdiction of the said court, and that they the said defendants could
not have been, and were not, properly served with the said writ of
summons through or upon any agent or representative of the defend-
ants within the jurisdiction of the said court; and that the plaintiff
caused and procured the said order to be made for service of the said
writ of summons on the said James Wilson Ramsay, by falsely repre-
senting to the said court that the said James Wilson Ramsay was the
agent of the defendants within the meaning of the said statute, whereas
in truth and in fact he was not such agent.

Surrejoinder,—that the said company, the defendants, had at the
time of the commencement of the said action in the said Court of
Queen's Bench in Ireland, an agent within the jurisdiction of the said
court, and that he the plaintiff did not cause or procure the said order
*215] of the said Court of Queen's Bench in Ireland in the replica-
tion and rejoinder mentioned, to be made, by falsely represent-
ing that the said James Wilson Ramsay was the agent of the defend-
ants within the meaning of the said statute, because he the plaintiff
said, that, at the time of suing out and serving of the said writ of
summons in the said action as in the replication mentioned, the said
James Wilson Ramsay was an agent of the defendants within the
jurisdiction of the said court, that is to say, in the city of Dublin:
that the affidavit by which it was made to appear to the satisfaction of
the said court that the defendants could be properly served with the
said writ through or upon an agent of the defendants within the juris-
diction of the said court, was an affidavit of one Bernard Egan, duly
made and sworn in the said court in the said action, and duly filed in
the said court on the 15th of January, 1852, in which the said writ was
set forth and recited, and it was sworn and represented to the court that
he the said Bernard Egan had on the day and year aforesaid served

The Professional Life Assurance Company (meaning the defendants, being such incorporated company as in the rejoinder mentioned), with the original writ of summons in the said action, by delivering unto and leaving with the said James Wilson Ramsay, the agent for the said company in the city of Dublin, in person, at his office, No. 103 Abbey Street, in the said city of Dublin, a true copy of the said original writ, and that he the said Bernard Egan had desired him to send the said copy so served to the office of the said company in London, and that he the said Bernard Egan at the same time showed him the said James Wilson Ramsay the said original writ of summons, and told him the true intent, nature, and meaning thereof: that, the said affidavit, being so sworn, and filed in the said court, was afterwards, on the 16th of January, 1852, read to the said court by *counsel on behalf of the plaintiff in the said action, and that afterwards, on the [*216 said day and year, the said court, on hearing such affidavit read, did make such order as in the replication in that behalf alleged, and which said order was in the terms following, that is to say,—“ On motion of Mr. Synan, of counsel for plaintiff, and on hearing affidavit of Bernard Egan read, it is ordered that service of the writ of summons upon the defendants in this cause, by delivering a true copy thereof, together with a true copy of this order, unto, and by leaving the same with, James Wilson Ramsay, the Dublin agent, and also by enclosing similar copies in a letter through the general post office directed to the London agent, be deemed good service of the said writ upon the said company: that the said James Wilson Ramsay in the said order mentioned was and is the said James Wilson Ramsay in the said replication and rejoinder respectively referred to, and thereinbefore and in the said affidavit also referred to: and that the plaintiff no otherwise caused and procured the said order to be made than as aforesaid, and that he made or caused to be made no false representation to the said court, as in the rejoinder alleged, nor, save as aforesaid, any representation whatever in that behalf; and that the contents of the said affidavit in that behalf were in fact true.

The defendants joined issue on the surrejoinder, and demurred thereto; and the plaintiff joined in demurrer.

The demurrer was argued in Trinity Term, 1853, when judgment was given for the plaintiff, on the ground that the second plea was bad: see 13 C. B. 787 (E. C. L. R. vol. 76).

At the trial of the issues of fact, a special verdict was found, which was in substance as follows:—

As to the first issue joined on the first count of the declaration, it was found, that, before and at the time of the suing out of the writ of summons in the said action, and until the recovery of the said judgment in *the Court of Queen's Bench in Ireland in the said count [*217 mentioned, the defendants were a joint stock company duly

registered in London according to the statute, as "The Professional Life Assurance Company," and carried on business as such life assurance company in London, one Edward Baylis then being the *manager, secretary, and actuary* of the said company in London; and that the said company also carried on such business in Dublin by one James Wilson Ramsay, their agent in that behalf, the said James Wilson Ramsay being employed by the defendants to obtain insurances for the said company, and having been appointed by and acting under a letter addressed to him by the said Edward Baylis on behalf of the said company, which letter was written on the 12th of February, 1850, and was in the words and figures following:—

"Professional Life Assurance Company.

"Offices, 76 Cheapside, London,

"12th February, 1850.

"Sir,—I have the pleasure to inform you, that, upon the recommendation of your father, conjointly with the numerous testimonials of your highly respectable friends in evidence of your qualifications and eligibility, you have been appointed agent for Dublin, in connexion with James Wilson Ramsay, Esq.

"The advantages and support offered by this corporation to the exertions of an agent, are of a very encouraging character. The institution possesses popular features exclusively peculiar to itself; and the directors allow a commission more than usually liberal; added to which, the operations of an agent are deemed co-extensive with his influence, that is to say, he is not confined by place or space as to agency, but is entitled to the full benefit of commission arising from every description of business introduced by him to the office, in whatever town or
 *218] *county parties having transactions with the company through him may be resident.

"The commission allowed, is, 10 per cent. on the amount of the first year's premiums, $7\frac{1}{2}$ per cent. on the amount of the second year's premiums, 5 per cent. on the amount of all future renewal premiums, or 20 per cent. in one payment in lieu of the above; also 2 per cent. on the amount of the purchase-money of immediate annuities; and 1s. per share for every share disposed of.

"I am desired by the directors to remind you, that, in undertakings of this kind, which are considered by capitalists the best of investments, it is the usual practice to absorb the whole of the shares in a London proprietary, leaving none for the creation and advantage of a provincial influence. The contrary is the course pursued by this company, which, as you will perceive by a perusal of a printed list of shareholders, has already obtained a sufficient guarantee for all the purposes and contingencies of a properly managed life assurance company.

"The directors are, therefore, desirous, and resolved, through the medium, and with the support, of their numerous agents and medical

referees, to extend their proprietary among every class, through every town and city in the United Kingdom, by an allotment of a few shares to each individual whom they may have it in their power and be disposed to recommend; while it will at the same time occur to you that that agency cannot fail to be most prosperous which contains the greatest number of shareholders.

"The deposit is 10s. per share, without the probability of a further call being made or required; and the liability of the shareholders is by the deed of settlement limited to their several amount of shares, while the advantages and privileges to the original proprietors, as *stated in full in the prospectus, are of a truly comprehensive [*219 and beneficial character.

"In reference to the shares, you will be pleased to notice the following particulars:—1. The entire capital of the company is 250,000*l.*, arising from 40,000 shares of 6*l.* 5*s.* each, the greater part of which have been actually sold and signed for,—2. The original deposit is 10s. per share; the remaining 5*l.* 15*s.* will be made up by the additions accruing from profits and bonuses,—3. By the deed of settlement, no proprietor is liable beyond the amount of his shares,—4. The holder of five shares, up to fifty, is entitled to one vote, and to an additional vote for every additional fifty shares held by him,—5. Interest is paid at the rate of 5 per cent. per annum on all paid up capital; such interest increasing year by year as the shares increase in value by the appropriation of profits; so that very considerable interest will be realized, until the amount of profits shall be sufficient to pay off the shares in full; after which, the corporation will be declared and constituted a mutual life assurance society,—Lastly. In addition to these advantages, there is one novel and most excellent feature, worthy of special attention, viz. that one-tenth of the entire profits of the company is set aside as an annuity fund.

"You will receive herewith powers of attorney to be filled up by parties taking shares, and authorizing any friend in town, or myself, to sign the deed of settlement on their behalf.

"You will also please to remember the shares constituting the proprietary and securing their influence, are in order to obtain life policies, annuities, endowments, and other business from which the profits are to be derived, and which you will therefore make it your constant endeavour to obtain.

"Anticipating the best results from your valuable co-operation in behalf of the institution, and soliciting your *earnest perusal and [*220 due appreciation of the above important details. I am, &c.,

"EDWARD BAYLIS,

"Resident manager and actuary."

It was further found, that, after the coming into operation of the 18 & 14 Vict. c. 18, intituled "An act for the regulation of process and

practice in the superior courts of common law in Ireland," and while the defendants so carried on business as aforesaid in Dublin by the said James Wilson Ramsay hereinbefore first mentioned, as such agent in their behalf as aforesaid, on the 15th of January, 1852, the plaintiff sued out the writ of summons in the said action in the said Court of Queen's Bench, in Ireland, against the defendants, which writ was in the words and figures following, that is to say, (setting it out); and that on the 15th of January, 1852, one Bernard Egan served a copy of the said writ of summons on the said James Wilson Ramsay, by delivering to him such copy in Dublin aforesaid, explaining to him the nature and effect thereof; and which is the service of the said writ mentioned in the affidavit of Bernard Egan hereinafter next mentioned: That no notice of the issuing of the said writ was ever given in the Dublin Gazette, and no notice thereof was ever given in one or any of the local newspapers of the county, city, or district in which the defendants resided, or the officer or agent to be served resided: That, on the said 15th of January, 1852, the said Bernard Egan duly made and swore in the said action in the said Court of Queen's Bench, in Ireland, an affidavit in the words and figures following, that is to say, —"In the Court of Queen's Bench. William Sheehy, plaintiff, The Professional Life Assurance Company, defendants: Whereas there issued forth of Her Majesty's superior courts of common law at Dublin, and under the common seal thereof, Her Majesty's writ of summons in *221] this cause, bearing teste the *15th day of January, 1852, whereby the said defendants were ordered, that, within eight days after the service of the said writ on them, exclusive of the day of such service, they should cause an appearance to be entered for them in Her Majesty's Court of Queen's Bench at Dublin, in an action of debt at the suit of the said plaintiff; and notice was also thereby given, that, in default of their so doing, an appearance might be entered by the said plaintiff, and that the said plaintiff might proceed thereon to judgment and execution, as by the said writ of summons hereunto annexed, reference being thereunto had, will appear. Issued by John Synan, No. 5, Upper Gloucester Street, in the city of Dublin, attorney for said plaintiff. Now Bernard Egan, of Little Strand Street, in the city of Dublin, law messenger, aged thirty years and upwards, maketh oath and saith, that, on this Thursday, the 15th day of January, he this deponent served The Professional Life Assurance Company of London with the original writ of summons above in part recited, by delivering unto and leaving with James Wilson Ramsay, who is agent for the said Professional Assurance Company, in Dublin, in person, at his office, No. 103, Abbey Street, in the city of Dublin, a true copy of said original writ of summons hereinbefore in part recited, and desired him to give said copy so served to the said company's officer in London, and at the same time showed him the said original writ of summons, and told him the

true intent, nature, and meaning thereof. BERNARD EGAN. Sworn before me, at my office on the Inns Quay, Dublin, this 15th day of January, 1852; and I know the deponent. THOMAS BYRON. JOHN SYNAN, plaintiff's attorney."

It was further found, that, on the 16th of January, 1852, the said Court of Queen's Bench in Ireland, having heard the said affidavit read, did thereupon make in the said action a certain order, in the words and figures following, that is to say,—“ William Sheehy v. The *Professional Assurance Company of London. Friday, 16th January, [222 1852. On the motion of Mr. Synan, of counsel for plaintiff, and on hearing affidavit of Bernard Egan read, it is ordered that service of the writ of summons upon the defendants in this cause, by delivering a true copy thereof, together with a true copy of this order, unto, and by leaving the same with, James Wilson Ramsay, the Dublin agent, and also by enclosing similar copies in a letter through the general post office, directed to the *London agent*, be deemed good service of the said writ upon the said company. By the court. CHRISTOPHER N. DUFF. JOHN SYNAN, attorney."

It was further proved, that, on the 19th day of January, 1852, the said Bernard Egan delivered to and left with the said James Wilson Ramsay, at his office in Dublin, a paper purporting to be a copy of the said writ of summons, and which was the service of the said writ of summons in the affidavit of Bernard Egan hereinafter next mentioned, which paper was in the words and figures following (setting it out,—the defendants being *mis-described*, as in the order), and also a copy of the said order of the said court; and also on the same day forwarded true copies of the said writ of summons and order respectively through the general post office, Dublin, enclosed in a letter addressed to the said Edward Baylis, then being *manager, secretary, and actuary* of the said company as aforesaid, at the company's office in London.

It was further found, that, on the 29th of January, 1852, the said Bernard Egan duly made and swore in the said action in the said Court of Queen's Bench in Ireland, an affidavit, in the words and figures following, that is to say,—“ Queen's Bench. William Sheehy, plaintiff, The Professional Assurance Company, defendants: Whereas, there issued forth of her Majesty's superior courts of common law in Ireland, and under the seal thereof, Her Majesty's writ of summons in this *cause, bearing date the 15th day of January, 1852, whereby the [223 defendants were commanded, that, within eight days after the service of such writ, they should cause an appearance to be entered for them in Her Majesty's Court of Queen's Bench at Dublin, in an action of debt, or, in default thereof, the said plaintiff might enter an appearance, and proceed thereon to judgment and execution, as by the said writ, now of record in the said court, will appear. William Sheehy v. The Professional Assurance Company of London. Friday, 16th January,

1852. On motion of Mr. Synan, of counsel for plaintiff, and on hearing affidavit of Bernard Egan read, It is ordered that service of the writ of summons upon the defendants in this cause, by delivering a true copy thereof, together with a true copy of this order, unto, and by leaving the same with, James Wilson Ramsay, the Dublin Agent, and also by enclosing similar copies in a letter through the general post office directed to the *London agent*, be deemed good service of the said writ upon the said company. By the court. CHRISTR. N. DUFF. JOHN SYNAN, attorney, Queen's Bench. Now, Bernard Egan, of Little Strand Street, in the city of Dublin, law messenger, aged thirty years and upwards, maketh oath and saith, that, on the 19th day of January instant, deponent served said Professional Assurance Company with said recited writ of summons and order, by delivering unto and leaving with James Wilson Ramsay, the Dublin agent of the said company, in his office Abbey Street, in the city of Dublin, true copies of said writ of summons and order respectively, and on the same day, and before six o'clock in the evening, deponent forwarded true copies of said writ of summons and order respectively, through the general post office, Dublin, enclosed in a letter directed to E. Baylis, the *London agent* of the said company, at the company's offices, 76, Cheapside, London, and *224] deponent paid the postage thereon, *BERNARD EGAN. Sworn before me at my office on the Queen's Quay, Dublin, this 29th day of January, 1852; and I know the deponent. THOMAS BYRON. JOHN SYNAN, attorney."

It was further found, that, on the said 29th of January, 1852, the time limited by the process having elapsed, and no appearance having been entered by the said defendants in the said action in the said Court of Queen's Bench in Ireland, and according to the course and practice of the said court in that behalf, the said Court of Queen's Bench in Ireland, on reading of the said affidavit, and a certificate of the proper officer of the said court in this behalf that (as the fact was) no appearance had been entered by the said defendants in the said action in the said Court of Queen's Bench in Ireland, according to the course and practice of the said court, then duly made an order in the said action in the words and figures following, that is to say,—“*Sheehy v. The Professional Life Assurance Company*. Thursday, 29th January, 1852. On motion of Mr. Synan, plaintiff's counsel, and on reading the affidavit of service of process, and certificate of no appearance, It was ordered that the plaintiff be at liberty to enter an appearance for the defendants pursuant to the statute. By the court. CHRISTR. N. DUFF."

It was further found, that, on the 4th of February, 1852, the plaintiff duly, and according to the course and practice of the said court, filed a declaration in the said action in the said Court of Queen's Bench in Ireland, and thereupon gave due notice therewith, that, if the defend-

ants did not plead thereto within and according to the time limited by the course and practice of the said court in that behalf, the plaintiff would sign judgment therein; and that, on the 16th of February, 1852, the plaintiff, in pursuance of the last-mentioned order, signed judgment in the said action in the said court, which said judgment was and is the judgment in the first count *mentioned, and which judgment is in the words following, that is to say,—“Pleas [*225 before the Lady the Queen, at the Queen's Courts of Hilary Term, in the 15th year in the reign of our sovereign Lady, Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, and so forth. Witness Francis Blackburne, Esq., A. Bushe. William Sheehy, of Broad Street, in the city of Limerick, grocer, plaintiff, The Professional Life Assurance Company, of London, offices, 76 Cheapside, London, defendants. County of the city of Limerick, to wit. William Sheehy, the plaintiff, by John Synan, his attorney, issued his writ of summons directed to The Professional Life Assurance Company, of London, offices, 76 Cheapside, London, the defendants, and which was served on the said defendants pursuant to an order of this honourable court bearing date the 16th of January, 1852, by delivering a true copy of the said writ of summons, together with a true copy of the said recited order, unto, and by leaving the same with James W. Ramsay, the Dublin agent of the said defendants, and also by delivering true copies of said recited writ of summons, and also of said recited order, in a letter in and through the general post office, directed to the London agent of said defendants; and an appearance was entered for the said defendants, pursuant to the statute, by the plaintiff's attorney; and the said plaintiff, on the 4th of February, 1852, filed his declaration in debt against the said defendants, for the recovery of the amount of a policy of assurance effected on the life of Michael Meade, therein mentioned, and on foot of which there is now due the sum of 768*l.*, as appears by the affidavit of Michael Maroney, this day filed in the proper office; and, the defendants not having pleaded, the plaintiff prays judgment: It is therefore considered by the court of our Lady the Queen here, that the said plaintiff do recover against the said defendants *his debt [*226 aforesaid, as also the sum 27*l.* 13*s.* 11*d.* sterling for his damages which he sustained, as well by reason of the detention of said debt, as for his expenses and costs by him laid out about his suit in this behalf, to the said plaintiff by the court of our said Lady the Queen now here with his assent adjudged: and the said defendants in mercy, and so forth. Mercy. Judgment entered the 16th of February, 1852.”

It was further found, that, afterwards, on the 21st of February, 1852, the defendants, by their counsel and attorneys, applied to a judge of the said Court of Queen's Bench in Ireland, to discharge the appearance so entered by the plaintiff in the said action in the said court, and

the declaration filed thereon; and the said judge, after hearing counsel for the parties in the said action, made an order in the words and figures following, that is to say,—“Queen’s Bench Chambers, 21st February, 1852. William Sheehy v. The Professional Assurance Company of London. On motion of Mr. M’Donagh, of counsel for defendants, who moves that the parliamentary appearance and declaration filed thereon, and all subsequent proceedings in this cause, be set aside, on the grounds that no sufficient or any notice of the issuing of the writ in this cause has been given in the Dublin Gazette, and in any one of the local newspapers of the county, city, or district in which the agent of the said defendants resides, and no such publication appears by the affidavit of service upon which the parliamentary appearance in this cause was entered, neither is there any affidavit whatever on the files of the court of such publication, and because such publication was a condition precedent on the ground that the parliamentary appearance was a nullity, or, if not so, was irregular; and, on hearing the notice of motion and documents therein mentioned read, and also on hearing Mr. J. D. Fitzgerald and Mr. Synan, of counsel for plaintiff, and Mr. *227] Malley, of counsel for *defendant,—By the Right Honourable the Lord Chief Justice of the Common Pleas, It was ordered that defendants’ motion be, and the same was thereby refused, with costs, *CHRISTR. N. DUFF*, clerk of the rules, Queen’s Bench Dublin.”

The special verdict then proceeded,—“But whether or not, upon the whole matters aforesaid, by the jurors aforesaid in form aforesaid found, the defendants were indebted as alleged by the said first count, the jurors are altogether ignorant, and therefore they pray the advice of the court of our said Lady the Queen of the Bench at Westminster; and if, upon the whole matter aforesaid, it shall seem to the said court that the defendants were indebted as alleged by the said count, then the jurors aforesaid, on their oath aforesaid, say that the defendants were indebted as alleged in the said count: but, if, upon the whole matter aforesaid, it shall seem to the court that the defendants were not indebted as alleged in the said count, then the jurors aforesaid, upon their oath aforesaid, say that the defendants were not indebted as alleged in the said count.”

As to the issue joined on the second count, the special verdict found, that, on the 21st of February, 1852, the order of the said Court of Queen’s Bench in Ireland in the said second count mentioned was made in the terms following, that is to say,—(setting it out, *ut ante*, p. 226); and that afterwards, to wit, on the day and year aforesaid, the costs of the said motion, pursuant to the said order, were duly taxed to the sum of 12*l.* 6*s.* 1*d.* “But, whether or not,” &c., &c., (as before, *mutatis mutandis*.)

As to the issue joined on the third count, the special verdict found that the defendants were not indebted as alleged.

As to the issue joined on the surrejoinder to the rejoinder to the replication to the second plea to the first count, the special verdict found, that, after the coming *into operation of the 13 & 14 [*228 Vict. c. 18, intituled, &c., at the time of the suing out of the writ of summons in the said action in the said count mentioned in the Court of Queen's Bench in Ireland, the defendants, and thence until the recovery of the said judgment in the said first count mentioned, carried on business in London as such life assurance company, the said Edward Baylis then being the manager, secretary, and actuary of the said company in London as aforesaid, and also carried on business in Dublin as such life assurance company, by the said James Wilson Ramsay, their agent in Dublin in that behalf, the said James Wilson Ramsay being employed by the defendants to obtain insurances for the said company, and having been appointed by and acting under the said letter hereinbefore mentioned to have been written to him on the 12th of February, 1850; and the defendants so carried on business until the recovery of the judgment in the said count mentioned: That, on the 15th of January, 1852, the plaintiff sued out of the said Court of Queen's Bench in Ireland the writ of summons in the said action in the said count mentioned, against the said defendants, which writ was in the words and figures following, that is to say, (setting it out): That, on the said 15th of January, 1852, one Bernard Egan, in the said surrejoinder mentioned, served a copy of the said writ on the said James Wilson Ramsay, in Dublin aforesaid, by delivering to him such copy, and showed him the said writ, and told him the intent, nature, and purport thereof: That, on the said 15th of January, 1852, the said Bernard Egan duly made and swore in the said Court of Queen's Bench in Ireland, an affidavit in the said action in the said count mentioned, which affidavit was duly filed in the said court, and was and is in the words and figures following, that is to say, (setting it out): That, on the 16th of January, 1852, the said Court of Queen's Bench in Ireland, having heard the said *affidavit read to them, did there- [*229 upon duly make an order in the said action, which order was and is in the words and figures following, that is to say, (setting it out): But that, whether or not, upon the whole matter aforesaid by the jurors aforesaid in form aforesaid found, the said surrejoinder is in substance true, the jurors aforesaid are altogether ignorant; therefore they pray the advice of the Court of our Lady the Queen of the Bench at Westminster aforesaid; and if, upon the whole matter aforesaid, it shall seem to the court that the said surrejoinder is in substance true, then the jurors aforesaid, on their oath aforesaid, say that the said surrejoinder is in substance true: but if, on the whole matter aforesaid, it shall seem to the said court that the said surrejoinder is not true in manner and form as alleged, then the said jurors, on their oath aforesaid, say that the said surrejoinder is not true in substance as alleged.

Shee, Serjt. (with whom was *Huddleston*), for the plaintiff.(a)—The first question is, whether the writ of summons in the action in which the judgment mentioned in the first count was obtained in the Irish court, was well served, by leaving a copy with Ramsay, the company's Dublin agent, and sending another copy by post addressed to Baylis, the manager, secretary, and *actuary in London: and this question turns mainly upon the construction which is to be put upon the 9th section of the 13 & 14 Vict. c. 18, an act for the regulation of process and practice in the superior courts of common law in Ireland. Before the passing of that act, the practice of the Irish courts in this respect was regulated by the 43 G. 3, c. 53, the 8th section of which provides, "that, whenever it appears to the court out of which the process issues, that all due diligence has been used to have the process of the court personally served, yet that, under the special circumstances of the case, appearing to the court by the affidavit of the plaintiff or his attorney, or the attorney employed for the purpose of having the process personally served, that it was impossible to procure personal service, that then and in such case it shall and may be lawful for the court out of which the process issues to substitute such other kind of service as to them shall seem fit." Under that statute, the practice had been, to allow service upon an agent, in the case of companies carrying on their principal business out of the jurisdiction, but having an office or an agent within the jurisdiction. In *Sadler v. Smithwick*, 1 *Crawf. & Dix*, 397, *Pennefather, B.*, upon an application for substituted service of a *capias ad respondendum* on an individual who had recently gone to America for the purpose of avoiding his creditors, said: "The jurisdiction of this court (the Court of Exchequer) extends only to persons living in Ireland. Where persons reside within the jurisdiction, we are enabled to substitute service when they conceal themselves or keep out of the way to avoid being served. In the case of insurance companies having offices in this country, we have allowed service to be substituted, considering the office where the insurances were effected to be the residence of the defendants, and they to be within the jurisdiction. The Court of Common Pleas thought that this court had gone too far in the cases of actions brought against insurance companies having offices here: but, with great deference for their opinion, I think we were right. But we cannot go any further." The subject came again under discussion in two subsequent cases,—*Malony v. Tullock*, 1 *Jones (Irish Exch.)* 114, and *Phelan v. Johnson*, 7 *Irish*

(a) The points marked for argument on the part of the plaintiff, were,—

"1. Judgment valid at common law by reason of service of process on the defendants at their office by post, which was only irregular at common law.

"2. Judgment valid by statute, because of service on 'an agent' of the defendants in Dublin; whether he was so within the strict meaning of the statute, was to be, and has been, decided by the courts in Ireland, on affidavits on both sides.

"3. And, at the utmost, there was only an irregularity, which cannot vitiate the judgment."

Law Rep. 527. In *Malony v. Tullock*, upon a motion to make absolute a conditional order to substitute service of a *capias ad respondendum* upon the agent with whom an insurance had been negotiated, and upon the law agent of the company, both of whom were resident in Ireland, the same learned judge said: "If this was *res integra*, I should not decide it, sitting alone: but this court, after full consideration of all the cases, came to a very clear opinion that such an application as the present ought to be granted, and that the holding open an office in this country by an insurance company, where in point of fact the contract is made, though the instrument may be fully completed in London, is an undertaking on the part of the company that their office is to be considered their residence, not only for the purpose of receiving the premiums, but also of enforcing the contract. On these grounds, the court substituted the service, considering that the company had adopted this country, not only as the place for entering into the contract, but also for the purposes of trial. We remain of that opinion; and therefore I have no hesitation in following the practice of the court, and substituting the service in the present instance." In *Phelan v. Johnson*, the subject is very fully gone into by Chief Baron Brady, who says: "The acts relating to the service of *mesne process* in England are, the 12 G. 1, c. 29, and the 5 G. 2, c. 27. No powers are given by those statutes to substitute the service of process; in other respects they are analogous to the 43 G. 3, c. 53, but the first of them contains very remarkable words. *It provides, that, in all cases where the cause of action shall not amount to the sum of 10*l.* or upwards, [232 and the plaintiff shall proceed by way of process against the person, he shall not arrest the defendant, but shall serve him personally, *within the jurisdiction of the court*, with a copy of the process. So that, in that act, there is no power to substitute service; and it is expressly required that the service be made within the jurisdiction. That being the condition of the law in England, the 43 G. 3, c. 53, is now to be considered. It is analogous to the 12 G. 1, and the 5 G. 2, so far as those acts prohibit arrest for sums under a specified amount, and in the mode of enforcing appearances. The 3d section of the 43 G. 3, c. 53, is that which corresponds with the 2d section of the 12 G. 1, c. 29; but it omits those remarkable words, 'within the jurisdiction of the court.' And that appears to have been done studiously. It is an omission deserving of great observation, and calculated to raise serious questions as to what were the purposes of the legislature in passing the 43 G. 3. Consequent on that omission, there is in the 43 G. 3, a special provision which exists in none of the English acts, viz. the 8th section, which authorizes the court to substitute service of the process. I apprehend, that, for the last forty years,—I may say, from the passing of that act,—there has been a current of decision, in this court (Exchequer) at least, which I conceive has put this construction upon this act of

parliament, that it warrants the substitution of service upon a party not bodily present in this country. In cases of actions upon policies of insurance, service of process has been from time to time substituted upon persons acting as agents of the insurance company and making this contract for them; and that course of practice, hitherto undisturbed by any authority or legal proceeding, has continued; establishing the *233] existence of a power in the court to act in substituting *service of process upon persons not bodily present within the jurisdiction. So that it occurs to me, that, taking the course and practice of this court as one so long established, it really comes to no more than a question of discretion how far the court will exercise the power given to it by the act; and I think it has not unwisely considered that it had this power, having regard to the omission of those remarkable words in the 43 G. 3, and the introduction of the clause authorizing the substitution of service into it." Such was the state of the law when the statute 13 & 14 Vict. c. 18 passed. The 1st section of that act enacts that the process for commencement of personal actions shall be according to a given form, and be called a writ of summons. Section 2 enacts that such writ shall be served personally within the jurisdiction of the court. Section 7 enacts, that, in default of appearance by the defendant on personal service, the plaintiff may enter an appearance for him. The 8th section enacts "that every such writ of summons issued against a corporation aggregate may be served personally upon the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation; and every such writ issued against the inhabitants of a barony, half-barony, or other like district, may be served personally on the acting high constable thereof, or any one of the acting high constables thereof; and every such writ issued against the inhabitants of any county or any city or town, or the inhabitants of any franchise, liberty, city, town, or place, not being part of a barony or other like district, may be served personally on some peace-officer or other known and responsible officer thereof; and every such writ issued against any other incorporated body having a known and responsible officer or agent, may be served personally on such agent; and, if any such defendants shall not appear according to the exigency of such *234] writ *in due time after such service thereof as herein authorized, in such case, upon affidavit made as hereinbefore provided of such personal service of such writ, and of the publication of the notice hereinafter provided, it shall and may be lawful for the plaintiff to enter an appearance for such defendants, and to proceed thereon as if such defendants had entered their appearance, any law or usage to the contrary notwithstanding: provided always, that, in all such cases, a sufficient notice of the issuing of the writ shall be given in the Dublin Gazette, and in one of the local newspapers of the county, city, or district in which the defendant or defendants, or the officer or agent to

be served, shall reside; the days for appearance to run in such cases from the day of the publication of such notice in Gazette or newspaper, whichever shall be the latest." And the 9th section enacts, "that, in case it shall be made appear by affidavit to the satisfaction of the court in which the appearance to the process should be made, or, in vacation, of any judge of either of the said courts, that any defendant has not been personally served with any writ of summons, and has not according to the exigency thereof appeared to the action, and that due and proper means were used to serve such writ, or *that such defendant resides out of the jurisdiction of the court, and can be properly served through or upon any agent or representative or any manager of the real or personal estate of such defendant within such jurisdiction*, or has removed to avoid service, or on any other good and sufficient grounds, it shall be lawful for such court or judge to authorize such substitution of service, *through the post office*, or in such manner, and with such extension of time for service and appearance, as to them or him shall seem fit; and, upon due proof of such substituted service, by affidavit, it shall and may be lawful for the plaintiff, in default of appearance *by such defendant in due time, to enter an appearance for such defendant, and to proceed thereon as if such defendant had [*235 entered his, her, or their appearance, any usage or law to the contrary notwithstanding." The 8th section clearly contemplates a mode of service in which the authority or intervention of the court is not required. The special verdict finds that such service was effected; but no notice was given in the Gazette or newspaper. Recourse must, therefore, be had to the 9th section, under the provisions of which the order of the Court of Queen's Bench in Ireland was made. The question is, whether the service of the writ of summons under that order was not a good service; and the first point will be whether the word "defendant" in the early part of that section includes an incorporated company, as it clearly does in s. 8. Now the interpretation clause, s. 51, provides that the words "party and person" shall extend to and include any corporation or other public body; and that *any words importing the singular number or the masculine gender only, shall be understood to include several matters as well as one matter, and several persons as well as one person*, and females as well as males, *and bodies corporate as well as individuals*, unless it be otherwise provided, or there be something in the subject or context repugnant to such construction. [CROWDER, J.—The 9th section would seem to be a substitution of such service as could be made personally.] In the former report of this case, 18 C. B. 800, Maule, J., says: "Personal service may comprehend a service which the 8th section of the 43 G. 3, c. 53, calls substituted service, viz. a service on the agent or officer of the corporation." [COCKBURN, C. J.—The 9th section certainly is very curiously worded. If it is to be limited to the case of a party,

living out of the jurisdiction, why make it a condition to the substituted
 *236] service by the post that there should be an *agent who can properly be served within the jurisdiction? What authority has the Court of Queen's Bench in Ireland to direct a service upon an agent in London?] Such authority is probably conferred by the 8th section of the 43 G. 3, c. 53, the words of which are very large, and which is not repealed. [CRESSWELL, J.—When the case was before the court on the former occasion, my Brother Maule suggested that this amounted to mere irregularity at the most. The special verdict does not find whether the defendants knew of the issuing of the writ of summons or not.] It is found that they moved to set aside the appearance entered under it. [CRESSWELL, J.—It may have come to their knowledge after the judgment was signed. There are numerous cases to show that a foreign judgment will not be enforced in our courts, where the party has not been served with process,—proceeding upon the notion that it is contrary to natural justice that a man should be condemned without having had an opportunity of being heard.] It is difficult to conceive that there could be anything contrary to natural justice in a judgment founded upon a service such as that shown to have been made upon Ramsay. If there were any irregularity in the course pursued in the Irish court, that is not a matter which this court can inquire into.

Then, as to the second count, which seeks to recover the costs awarded to the plaintiff on the dismissal of the motion to set aside the proceedings in the Court of Queen's Bench,—it will be said that no action lies for those costs, the order being interlocutory. It is true, that, in general, an action will not lie in our courts to enforce a decree or order of a foreign court which is not in its nature final: *Patrick v. Sheddon*, 2 Ellis & B. 14 (E. C. L. R. vol. 75): neither will an action lie upon an interlocutory order of one of our own courts, because there is a more appropriate mode of enforcing it, viz. by attachment, or by
 *237] *execution. But, in *Russell v. Smyth*, 9 M. & W. 810,† it was held that an action of assumpsit or debt might be maintained against a defendant resident in this country, for costs awarded against him, after appearance, by a decret of the Court of Session in Scotland in a suit for a divorce. Lord Abinger there says: "The action may be sustained on the ground of morality and justice. The maxim of the English law, is, to amplify its remedies, and, without usurping jurisdiction, to apply its rules to the advancement of substantial justice. Foreign judgments are enforced in these courts, because the parties liable are bound in duty to satisfy them. The principles relating to this subject are well laid down by Lord Mansfield in his judgment in *Robinson v. Bland*, 2 Burr. 1077. Mr. Watson urges that no action for costs has ever been brought on a foreign judgment. I cannot quite assent to that; but, supposing it were so, I must own I should be

disposed to set an example of such an action. Suppose litigation arises in France relating to real property, and costs are given against a party who comes to this country: if the English law gives no remedy, the debt would be lost. In such a case, I should be disposed to say that an action for those costs may be maintained in this country."

Bovill, Q. C. (with whom was *Byles*, Serjt.), *contra*. (a)*—The 43 G. 3, c. 53, has no bearing upon this case. The 13 & 14 Vict. c. 18, relates to a new sort of process, and an entirely new mode of procedure: and, where it was intended to save the provisions of former acts, it is done by express enactment as in s. 4. The former statute is therefore virtually repealed, and is altogether inapplicable. All the provisions of the recent act contemplate *personal* service of the process,—as in s. 2, which provides that the writ "may be served personally in any place in which the defendant or defendants may be found, *within the jurisdiction of the court*," and s. 7, which enables the plaintiff to enter an appearance for the defendant in default of appearance on personal service. Then comes section 8, which provides, amongst other things, for the service of process upon incorporated bodies "having a known or responsible officer or agent," by personal service on such officer or agent, and notice in the *Dublin Gazette* and in a local newspaper. The 9th section applies to cases where the defendant cannot be personally served under s. 7, but may be properly served through or upon some agent or representative within the jurisdiction. It has no application at all to section 8: if it had applied to section 8, it would have altogether repealed it. The 8th section precisely applies to this case, assuming Ramsay to have been the agent of the company, which is sufficiently found by the special verdict. There is an incorporated company, and there is an agent residing within the jurisdiction through whom the service can be properly effected, and he has been personally served. The statute (s. 8) requires notice in the *Dublin Gazette* and in a local newspaper. This the special verdict finds has not been given. The 9th section contemplates a case where there can be *personal* service on the defendant, and not to a case where somebody else is to be served for him: it contemplates the case of a *natural* person who may be served, and *who may reside. [CROWDER, J.—Suppose there had been no agent in Dublin?] Still, it is submitted, the section would not apply: if there be no agent within the jurisdiction, there can be no reason why a foreign corporation should be sued there. This subject is very elaborately discussed in

(a) The points of law intended to be argued by the defendants, are, "that the surrejoinder neither traverses nor confesses and avoids the rejoinder; that, the defendants being a corporation aggregate, the writ of summons could not properly have been served on an agent until the 8th section of the statute requiring the service to be on the mayor or other head officer, town-clerk, clerk, treasurer, or secretary; or at least it should have been alleged that the agent was a known and responsible agent of the defendants, or an agent of their real and personal estate, or an agent within the true intent and meaning of the statute."

Story's Conflict of Laws. In § 539, that learned jurist thus lays down the general rule:—"Considered in an international point of view, jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or upon the thing being within the territory; for, otherwise, there can be no sovereignty exerted, upon the known maxim, *Extra territorium jus dicenti impune non paretur*: Dig. Lib. 2, tit. 1, l. 20. Boullenois (1 Boullenois, Pr. Gen. 1, 2, pp. 2, 3), puts this rule among his general principles. The laws of a sovereign rightfully extend over persons who are domiciled within his territory, and over their property which is there situate. Vattel (B. 2, Ch. 8, § 84), lays down the true doctrine in clear terms. 'The sovereignty (says he), united to domain, establishes the jurisdiction of the nation in its territories or the country which belongs to it. It is its province, or that of its sovereign, to exercise justice in all places under its jurisdiction, to take cognisance of the crimes committed, and the differences that arise in the country.' On the other hand, no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals:" *Picquet v. Swan*, 5 Mason (American), 35, 42; *Russell v. Smyth*, 9 M. & W. 810.† Further, in § 556, he says: "Having stated these general principles in relation to jurisdiction (the result of which is, that no nation can rightfully claim to exercise it, except as to persons and property within its own domains), we are *next led to the consideration of the question *240] in what manner suits arising from foreign causes are to be instituted and proceedings to be had till the final judgment. Are they to be according to the law of the place where the parties or either of them live? Or, are they to be according to the modes of proceeding and forms of suit prescribed by the laws of the place where the suits are brought? Fortunately, here there is scarcely any ground left open for controversy either at the common law, or in the opinions of foreign jurists, or in the actual practice of nations. It is universally admitted and established that the forms of remedies, and the modes of proceeding, and the execution of judgments, are to be regulated solely and exclusively by the laws of the place where the action is instituted, or, as the civilians uniformly express it, according to the *lex fori*."(a) Again, in § 557, the learned commentator says: "The reasons for this doctrine are so obvious that they scarcely require any illustration. The business of the administration of justice by any nation, is, in a peculiar and emphatic sense, a part of its public right and duty. Each nation is at liberty to adopt such forms and such a course of proceeding as best comport with its convenience and interests, and the interests of its

(a) Citing 1 Burge Comm. 24, *Fergusson v. Fyffe*, 8 Clark & F. 121, *General Steam Navigation Company v. Gaillou*, 11 M. & W. 877.†

own subjects, for whom its laws are particularly designed. The different kinds of remedies, and the modes of proceeding best adapted to enforce rights and guard against wrongs in any nation, must materially depend upon the structure of its own jurisprudence. What would be well adapted to the jurisprudence, either customary or positive, of one nation, for rights which it recognised, or for duties which it enforced, or for wrongs which it redressed, might be *wholly unfit for that of another nation, either as having gross defects, or steering [*241 wide of the appropriate remedial justice. A nation acknowledging the existence of peculiar rights and privileges, either personal or real, such as seignorial rights, or trusts in the realty, would naturally introduce correspondent remedies. While other nations, in which such rights and privileges and trusts did not exist, might well dispense with the formalities which they might require. The jurisprudence of one nation may be very refined and artificial, with a multitude of intricate and perplexed proceedings: that of another may be rude, uninformed, and harsh, consisting of an undigested mass of usages. It would be absolutely impracticable to apply the process and modes of proceeding of the one nation to the other. Besides, there would be an utter confusion in all judicial proceedings, by attempting to engraft upon the remedies of one country those of all other countries whose subjects should be parties or be interested therein. No tribunal on earth, however learned, could hope by any degree of diligence to master the laws and processes and remedies of all other nations, and the qualifications and limitations properly belonging thereto. A whole life might be passed in obtaining little more than a few unconnected elements; and litigation would thus become unnecessarily complicated, if not absolutely interminable. All that any nation can, therefore, be justly required to do, is, to open its own tribunals to foreigners in the same manner and to the same extent as they are open to its own subjects; and to give them the same redress as to rights and wrongs which it deems fit to acknowledge in its own municipal code for natives and residents." [COCKBURN, C. J.—Suppose a writ issued here against a person resident in Ireland, and service was effected upon an agent,—would a judgment obtained thereon be valid?] Clearly not. [CRESSWELL, J.—The usual ground for *declining to give effect to a [*242 foreign judgment obtained against a party in his absence, is, that it is contrary to natural justice. What is there contrary to natural justice in saying that a party shall be bound by the judgment, where he has had notice of the proceeding, and might have appeared? COCKBURN, C. J.—What say you to the 19th section of the Common Law Procedure Act, 1852?(a)] The judgment might fix the party and

(a) "In any action against a person residing out of the jurisdiction of the said courts (the three superior courts), and not being a British subject, the like proceedings may be taken as against a British subject resident out of the jurisdiction [s. 18], save that, in lieu of the form of writ of

his property within the jurisdiction; but out of the country it would be unavailing. Story emphatically says (§ 539), "No sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions." [CRESWELL, J.—The question is, what effect a foreign court will give to a judgment so obtained.] In *Jeffreys v. Boosey*, 4 House of Lords Cases, 815, 926, Parke, B., says: "It is clear that the legislature has no power over any persons except its own subjects, that is, persons natural born subjects or resident, or whilst they are within the limits of the kingdom. The legislature can impose no duties except on them; and when legislating for the benefit of persons, must *primâ facie* be considered to mean the benefit of those who owe obedience to our laws, and whose interests the legislature is under a correlative obligation to protect." And Lord St. Leonard's says,—p. 980: "It is quite clear as an abstract proposition, that an act of parliament of this country having within its view a municipal operation, having, as in this particular case, a territorial operation, and being therefore limited to the kingdom, cannot be considered to provide for foreigners, except as both *243] statute and common law do provide for foreigners when they become resident here, and owe at least a temporary allegiance to the sovereign, and thereby acquire rights just as other persons do; not because they are foreigners, but because, being here, they are here entitled, in so far as they do not break in upon certain rules, to the general benefit of the law for the protection of their property, in the same way as if they were natural born subjects." That is the general principle which will be found to pervade all the cases on the subject. Thus, in *The Dundalk Railway Company v. Tapster*, 1 Q. B. 667, 1 Gale & D. 657, a public local act, 1 Vict. c. xcvi., for making a railway in Ireland, provided that, if any proprietor of shares should refuse to pay a call, it should be lawful for the company to sue for it in any of the Queen's courts of record in Dublin, and gave a general form of declaration: and it was held, that, the debt and the remedy being created by the statute, the company were bound to pursue the remedy pointed out by it, and could not bring an action for a call, and declare in the general form, in an English court. [COCKBURN, C. J.—The Court of Queen's Bench in Ireland clearly had jurisdiction over the subject-matter, inasmuch as the company carried on business by means of an agent in Dublin. Your argument is, that there is an irregularity,

summons in the schedule A. to this act annexed, marked No. 2, the plaintiff shall issue a writ of summons according to the form contained in the said schedule A. marked No. 3, and shall in manner aforesaid serve a notice of such last-mentioned writ upon the defendant therein mentioned, which notice shall be in the form contained in the said schedule also marked No. 3; and such service shall be of the same force and effect as the service of the writ of summons in any action against a British subject resident abroad, and, by leave of the court or a judge, upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon."

or an illegality, in the process by which the defendants *were brought before the court. Is not that procedure?] It is sub- [*244
mitted that the Irish court had no jurisdiction over an English corporation. [CRESSWELL, J.—The cases cited show that the Irish courts have long assumed to have jurisdiction under such circumstances.] It may be to the extent of any property the corporation may have in Ireland: otherwise they clearly could have no jurisdiction except such as is conferred by the 13 & 14 Vict. c. 18. [COCKBURN, C. J.—That statute does not affect to confer jurisdiction. It only provides for substitution of service of process. It applies to the procedure only. Suppose an incorporated company carrying on business in London and in Dublin, contract a debt in Dublin, where they are represented only by an agent,—would they not clearly be within the jurisdiction of the Irish courts, though, but for some statutory provision, beyond the immediate reach of the process of the court? The object of the act was, to substitute some other service than that which the law ordinarily provides. How can we deal with the question whether the service of the process has been in accordance with the course and practice of the Irish court?] It is submitted that the Irish court has no jurisdiction over non-resident strangers, except that which is given them by the statute. In the case of corporate bodies, the jurisdiction clearly is given by the 8th section. The 9th section applies to natural persons only, and not to corporations: and no aid can be derived from the interpretation clause. Besides, there is no finding that the copy of the writ of summons, and of the order of the court, were sent to the London agent: the person to whom they were sent might or might not be the agent of the company. [CRESSWELL, J.—The special verdict may be amended in that respect, if necessary.] Then, the order was, for service of a copy of the writ of summons. That which was sent was not a “copy;” the word “Life” being omitted in the description of the *company; [*245
and in this respect, the affidavit and the order follow the supposed copy of the writ. Now, inasmuch as a corporate body exists only in name, the name is of the essence of the corporation. And this is a defect which cannot be remedied by amendment.

As to the second count,—*Patrick v. Shedden*, 2 Ellis & B. 14 (E. C. L. R. vol. 75), is an authority to show that an action will not lie upon an order for interlocutory costs. In *Russell v. Smyth*, 9 M. & W. 810,† the decree was final: it was in effect a judgment. But the mere order of another court for the payment of costs, is not a good ground of action: *Fry v. Malcolm*, 4 Taunt. 705. So, in *Hookpayton v. Busell*, 10 Exch. 24,† it was held that no action will lie upon an undertaking contained in a judge’s order, though the order be made by consent, and the undertaking be founded upon a good consideration. Pollock, C. B., there says: “The proper remedy for disobedience of the order, is, by attachment. We ought to guard against attempts to

create new causes of action, and new modes of multiplying costs." And Martin, B., observes, that, "if the argument on behalf of the plaintiff is correct, an action would lie for the disobedience of every judge's order in which a party undertakes to do some act." In *Emerson v. Lashley*, 2 H. Bla. 248, it was held that no action will lie in a superior court, to recover costs ordered to be paid by a rule of an inferior court in the course of a suit there, notwithstanding the defendant should not be liable to an attachment of the inferior court, by being resident out of its jurisdiction. Eyre, C. J., in giving judgment, there says,—“If there were nothing else in this case but the mere circumstance of its being an action brought for the first time, the court would think again and again before they would give it any encouragement. In general, there is another remedy (however that remedy may fail in an inferior court, whose jurisdiction is local); and the consequence of our determining that an action would *lie for such costs as these, would be, *246] that, instead of applications to the court for their superior interference, numberless actions would be brought, of which we have enough already. And, upon general principles of law, it seems pretty clear that no action can lie for such costs. In actions brought in superior courts, the costs become a duty only by being united with the debt in the judgment: there is that sort of credit given to the judgments of a court, that they create debts and duties upon which actions of debt are founded. General policy and convenience require that faith should be given to those judgments, and that duties should arise: but, as to the conduct, and all the steps belonging to the conduct of the interlocutory proceedings, they are fit to be regulated by the authority of the court where they arise, but by no means fit to be the foundation of general duties creating moral obligations. It is the power of the court that enforces these kind of orders; and the power of the court will always be regulated by the discretion of the court in causes which come before them.” That reasoning exactly applies to this case. In *Carpenter v. Thornton*, 3 B. & Ald. 52 (E. C. L. R. vol. 5), where a bill had been filed for the specific performance of an agreement for the purchase of an estate, and the decree was for payment of interest on the purchase-money, and costs,—it was held that no action at law was maintainable to recover such interest and costs. And Holroyd, J., said: “There is no instance of an action brought on a rule of court for payment of money. The mode of enforcing such an order, is, by attachment for contempt in not obeying an order of the court. Now, although that does not absolutely show that such an action is not maintainable; yet, where no such action has ever been maintained, it lies on the party bringing such action to state a clear principle on which it is maintainable.” So, in *Dent v. Basham*, 9 Exch. 469,† it was held that no *247] action lies for disobedience of a *judge's order made under the 6 & 7 Vict. c. 78, s. 37, for the delivery of a bill of costs,—and

upon the same ground, viz. that attachment is the appropriate remedy. Alderson, B., there says: "The only way in which these orders can be enforced, is that which is expressly given, viz. by attachment. I quite agree with what was said by two of the learned judges in *Emerson v. Lashley*, that this is a form of proceeding to which no encouragement ought to be given; and that it is better to submit to a particular inconvenience than to introduce a general mischief. For, if it were held that an action would lie in the present case, inasmuch as scarcely an order is ever obeyed within a reasonable time, an action would be brought in almost every case." The order itself creates no debt: nor does it become a debt by reason of the fact of the party being, or subsequently going, out of the jurisdiction.

Shee, Serjt., in reply.—The 9th section of the 13 & 14 Vict. c. 18, enacts, that, in case it shall be made appear by affidavit to the satisfaction of the court, that any defendant has not been personally served with any writ, and has not appeared to the action, and that due and proper means were used to serve such writ,—or that such defendant resides out of the jurisdiction of the court and can be properly served through or upon an agent within such jurisdiction,—or has removed to avoid service,—or on any other good and sufficient grounds,—it shall be lawful for such court or judge to authorize such substitution of service, through the post office, or in such manner, and with such extension of time for service and appearance, as to them shall seem fit. [COCKBURN, C. J.—What "other ground" do you suggest for the substitution of service, than that the defendants are out of the jurisdiction?] All the cases relied on by the other side are cases in which there was no difficulty in enforcing the order during the whole course of the proceedings. [*248 CROWDER, J.—Do you insist that you can support an action upon the judgment, supposing the 13 & 14 Vict. c. 18, s. 9, not to apply?] The order for substituted service was well made, independently of that section. A judgment, though obtained against an absent party, is not contrary to natural justice, if there has been an opportunity afforded him to appear. In *Reynolds v. Fenton*, 3 C. B. 187 (E. C. L. R. vol. 54), in assumpsit on a judgment or decree of the Tribunal of Commerce at Brussels, the defendant pleaded, that *he was not at any time served with any process* issuing out of that court, at the suit of the plaintiffs, for the causes of action upon which the said judgment or decree was obtained, *nor had he at any time notice of any such process*, nor did he appear in the said court to answer the plaintiffs: and the plea was held bad, inasmuch as it did not show that the proceedings against the defendant in the Belgian court were so conducted as to deprive the defendant of the opportunity of defending himself therein. Upon the case of *Ferguson v. Mahon*, 11 Ad. & E. 179 (E. C. L. R. vol. 39), 3 P. & D. 143, being cited, Maule, J., there says: "I take the distinction between that case and

the present to be this: the court there could take judicial notice that the law of Ireland is the same as the law of this country with regard to the commencement of the suit *by process*: but, how do we know that there may not be a good commencement of a suit in Belgium by *verbal summons*?"

Cur. adv. vult.

CRESSWELL, J., delivered the judgment of the court:—

This was an action on a judgment obtained in the Court of Queen's Bench in Ireland.

In the first count the plaintiff declared, that, in the Court of Queen's Bench in Ireland, he recovered against the defendants 768*l.*, adjudged *249] to be due from them to *the plaintiff, and 27*l.* 13*s.* 11*d.* for damages for the detention thereof, and costs. In the second count, that the Court of Queen's Bench in Ireland, by a certain order and decree did further award and adjudge unto the plaintiff, in a certain proceeding then taken by the defendants before the said court in the said suit upon the said judgment, the sum of 12*l.* 6*s.* 1*d.*, to be paid by the defendants to the plaintiff for costs by him in such suit in that behalf further expended. The third count was for interest.

The defendants pleaded,—first, never indebted, upon which issue was joined,—secondly, that they were not at any time served with any summons or process issuing out of the said Court of Queen's Bench in Ireland, and that the plaintiff irregularly and behind the back of the defendants caused an appearance to be entered for them in the said action, and thereby obtained the judgment therein when the defendants were not within the jurisdiction of the said court, and had not been served with any summons or process to appear in the said action.

The plaintiff replied, that the action was commenced after the passing of the statute 13 Vict. c. 18, by writ of summons; that it was made to appear to the court by affidavit that the defendants had not been personally served, but that they resided out of the jurisdiction of the court, and could be properly served through or upon a certain agent or representative of the defendants within the jurisdiction; whereupon an order was made that it should be served by delivering a copy of the writ and of that order to the said agent, and by sending copies of the writ and order through the general post to the secretary and manager in London; and that the plaintiff complied with such order.

The defendants rejoined, that the plaintiff obtained the order by *250] falsely representing to the court that J. W. *Ramsay was the agent of the defendants within the meaning of the statute.

The plaintiff surrejoined, setting out the affidavit on which the motion was founded, and averring that it was true.

The defendants traversed the surrejoinder, and demurred.

This demurrer was argued in Trinity Term, 1858, when judgment was given in favour of the plaintiff, on the ground that the second plea was bad: see 13 C. B. 787 (E. C. L. R. vol. 76). The judgment of

Maule, J., proceeded on the ground that it was consistent with all the allegations of the plea, that the defendants appeared to the writ; but, without resorting to that reason, it appears to have been considered that the plea was bad, because it did not show that the defendants had not knowledge of the issuing of the writ of summons, and that this court could not take notice of a mere irregularity in the proceedings of the Court of Queen's Bench in Ireland.

The issues joined on the first plea, and the traverse of the surrejoinder, afterwards came on to be tried, and a special verdict was found, the material parts of which were as follows:—[His Lordship read the passages marked with brackets, and stated the questions reserved by the special verdict for the opinion of the court.]

It appears, then, that the defendants were a joint stock company duly registered in London, and carried on business in London, one E. Baylis being the manager, secretary, and actuary of the company in London; and that they also carried on business in Dublin by James Wilson Ramsay, their agent in that behalf; that a writ of summons was issued out of the Court of Queen's Bench against the company, and personally served on J. W. Ramsay, but not advertised in the Gazette or any newspaper; that afterwards an order was made by the *Court of Queen's Bench, that service of the writ of summons [*251 on the defendants, by delivering a copy to J. W. Ramsay, with a copy of that order, and by sending similar copies through the general post office, directed to the London agent, should be deemed good service of the writ; that the copies were accordingly served personally on J. W. Ramsay, and sent through the general post office directed to Edward Baylis, the manager, secretary, and actuary, at the company's office in London; that the company did not enter an appearance; that the court, on application to them, gave the plaintiff leave to enter an appearance for them, which was done, and other proceedings to judgment taken, according to the practice of the court; and that afterwards an application was made by the defendants to the Court of Queen's Bench in Ireland to set aside the appearance entered for the defendants, and all subsequent proceedings, which was dismissed with costs, which were taxed at 12*l.* 6*s.* 1*d.*

On the argument of this special verdict, it was contended for the plaintiff, that, by the 48 G. 3, c. 53, s. 8, the Court of Queen's Bench in Ireland had authority to order that service of process as effected in this case should be deemed good service. The words are,—“Provided always, and be it further enacted, that, whenever it appears to the court out of which the process issues, that all due diligence has been used to have the process of the court personally served, yet that under the special circumstances of the case appearing to the court by the affidavits of the plaintiff or his attorney, or the attorney employed for the purpose of having the process personally served, that it was impossible to

procure personal service, that then and in such case it shall and may be lawful for the court out of which the process issues, to substitute such other kind of service as to them shall seem fit." Some authorities *252] from the Irish reports were cited. *In *Malony v. Tullock*, 1 Jones's (Irish) Exch. Rep. 114, and *Phelan v. Johnson*, 7 Irish Law Rep. 527, it was held, that, under this section, the court might authorize service by serving the agent in Ireland of an insurance company carrying on business in London. And it was insisted that the 13 Vict. c. 18, "for the regulation of process and practice in the superior courts of common law in Ireland," did not take away or narrow the jurisdiction of the Irish courts in this respect, and that, if it had the effect of abolishing the old, and establishing a new practice, still the order made in this case was warranted by the 9th section of the latter act. It was further said, that, if there were anything irregular in the course pursued in Ireland, that was not a matter that could be inquired into in this court.

On the other hand, it was contended that the question depended entirely on the true construction of the 13 & 14 Vict. c. 18; that the 9th section did not warrant the making of the order for substituted service; and that, consequently, the defendants were never brought into court, and the whole of the proceedings there were null and void.

We are of opinion that our judgment must be in favour of the plaintiff.

This court has already decided in this case that the plea merely alleging the absence of personal service of any writ or process, was bad; and, as far as that point is concerned, we adhere to our former decision. But the special verdict goes further, and shows in what manner the process was served, viz. personally upon an alleged agent, and through the post office on the manager, secretary, and actuary in London, in pursuance of an order of the court. Now, after the 43 G. 3, c. 53, was passed, it appears from the cases cited that the superior courts in Ireland were in the habit of making orders that service in *253] Ireland on the agent of an incorporated company *should be deemed sufficient: and, if no subsequent act had been passed affecting the question, the order allowing such service in this case would have been in conformity with many of their decisions. There is nothing in it contrary to natural justice: it would afford the party sued an opportunity of coming to defend: and we could not under such circumstances have treated a judgment obtained according to the established practice of the court as a nullity. But it was contended that the 43 G. 3, c. 53, s. 8, was in effect repealed by the 13 & 14 Vict. c. 18. The 7th section of that act provides, that, in all cases of personal service, where the defendant does not appear in due time, the plaintiff may enter an appearance for such defendant, and proceed as if the defendant had entered an appearance. The 8th section enacts that writs issued

against certain specified corporate or quasi corporate bodies might be served personally on certain persons designated,—“And every such writ issued against any other incorporated body (which would include the defendants) having a known or responsible officer or agent, may be served personally on such officer or agent;” and, if any such defendants shall not appear, it shall be lawful for the plaintiff to enter an appearance for them, &c., as provided in s. 7: Provided always, that, in all such cases, a sufficient notice of the issuing of the writ shall be given in the Dublin Gazette and certain newspapers. This section, then, places plaintiffs suing corporate bodies, who personally served the persons designated, and gave the notice prescribed, in the same position as to further proceedings as in cases where the defendants were natural persons; and there was no occasion to apply to the court on the subject. The service on the agent was to have the effect of personal service on the party sued. Had notice been given in the Gazette and newspapers, as required by this section, the appearance entered would have been valid, without obtaining any *leave of the court: and we are inclined [*254 to think that entering an appearance without such notice would have been irregular only, and not void, and that such irregularity could not be used as an answer to an action on the judgment: but it is not necessary to decide this point. At all events, the clause does not in terms interfere with the practice previously existing in the Irish courts, of allowing, upon application duly made, a substituted service in cases which they considered within the 48 G. 3, c. 58; nor do we think it was intended to have that effect.

But the 9th section gives the courts power to direct substituted service. It enacts, “that, in case it shall be made to appear by affidavit to the satisfaction of the court in which the appearance to the process should be made, or, in vacation, of any judge of either of the said courts, that any defendant has not been personally served with any writ of summons, and has not according to the exigency thereof appeared to the action, and that due and proper means were used to serve such writ, or that such defendant resides out of the jurisdiction of the court, and can be properly served through or upon any agent or representative or any manager of the real or personal estate of such defendant within such jurisdiction, or has removed to avoid service, or on any other good and sufficient grounds, it shall be lawful for such court or judge to authorize such substitution of service through the post office, or in such manner, and with such extension of time for service and appearance, as to them or him shall seem fit; and, upon due proof of such substituted service, by affidavit, it shall and may be lawful for the plaintiff, in default of appearance by such defendant, in due time, to enter an appearance for such defendant, and to proceed thereon as if such defendant had entered his, her, or their appearance, any usage or law to the contrary notwithstanding.”

*255] It was argued for the defendants, that this section, *requiring an affidavit that the defendant had not been personally served, must have been intended to apply only where there was a defendant whom it was possible to serve personally, which could not be said of an incorporated company: but that is not by any means clear, for, the preceding section treated personal service on certain officers or agents of corporations as personal service on the defendants, for the purpose of allowing an appearance to be entered for them; and every thing required to give the court or a judge authority to allow substitution of service may exist in the case of a corporation,—an affidavit may be made that the defendants have not been personally served with the writ, that due and proper means were used to serve it (that is, as directed by s. 8), and that the defendants reside out of the jurisdiction, and can be properly served through an agent. And this section may have a very useful operation, notwithstanding the power given by the 8th section to serve personally “a known and responsible officer and agent;” for, there may be an agent through whom the court may think the writ may be properly served, although he may not answer the description given in the 8th section. And the language of the section in this respect is similar to that of the 43 G. 3, c. 53, s. 8; for, that authorized orders for substituted service only where all due means had been adopted for having the process served *personally*, and yet it was held to extend to incorporated companies.

If it had been necessary to the maintenance of this action to say that the 9th section gave the court power to order substituted service in this case, there would probably have been some difference of opinion on the bench. But, if, as contended in argument, it does not apply to corporate bodies, we are all of opinion that there is nothing in the act taking away the jurisdiction before existing; and the service allowed *256] in this case was *in conformity with the practice formerly existing in the Court of Queen’s Bench in Ireland. Quâcunque viâ, therefore, we must give effect to the judgment of the court below, and give our judgment for the plaintiff as to the issue joined on the first count, which in effect decides in favour of the plaintiff the question raised on the traverse of the surrejoinder.

A minor question was raised on the issue as to the second count, viz. the power to sue for the costs awarded to the plaintiff when the motion to set aside the proceedings in the Court of Queen’s Bench in Ireland was dismissed. As to that sum, we are of opinion that it falls within the general rule applicable to interlocutory and collateral proceedings. The liability to costs depends solely on the order of the court; and that order can only be enforced by attachment. It is not like a decree or judgment, upon which an action may be maintained, as in *Russell v. Smyth*, 9 M. & W. 810,† and *Henderson v. Henderson*, 6 Q. B. 288

E. C. L. R. vol. 51). As to that sum, therefore, we give judgment for the defendants.
Judgment accordingly.(a)

(a) A writ of error is now (M. T. 1857) pending.

By the 43 G. 3, c. 53, s. 8, the "special circumstances" which give the court jurisdiction to order substituted service, are required to be made to appear to them "by the affidavit of the plaintiff or his attorney, or the attorney employed for the purpose of having the process personally served." In this case, the affidavit was not such a one as the statute requires; but appears by the special verdict to have been made by an ordinary process-server. In *Maloney v. Tullock*, 1 *Ileser's Irish Exch. Rep.* 114, and *Phelan v. Johnson*, 7 *Irish Law Rep.* 527, the reports do not state by whom the affidavits were made: but, in *Sadlier v. Smithwick*, 1 *Crawford & Dix*, 397, *Kidd v. Riddle*, 1 *Irish Common Law Rep.* 85, and *Lynskey v. The Asylum Life Assurance Company*, 9 *Irish Law Rep.* 299, the affidavits were by the plaintiffs themselves, and in *M'Cullagh v. The Yorkshire Assurance Company*, 1 *Crawford & Dix*, 264, by the plaintiff's attorney.

*SIMPSON and Others, Executors of WILLIAM WARRE
SIMPSON, deceased, v. THE ACCIDENTAL DEATH INSURANCE COMPANY. [*257]

A, on the 22d of January, 1851, effected with the defendants an insurance against death or injury from accident, the premium on which was payable on the 22d of January in each year. By one of the conditions endorsed on the policy (the 1st), it was provided that the premium was to be paid "within twenty-one days from the day on which the same should first accrue or become due," and that, "provided the same should be from time to time paid within such space of twenty-one days, the policy should not be void, notwithstanding the happening before the expiration of such space of twenty-one days of the event or events upon the happening whereof the amount secured by the policy should, according to the terms thereof, become payable." By another condition (the 2d), it was provided, that, "if the premium should be unpaid for twenty-one days next after it should become due, the policy should be absolutely void, and the assured should forfeit all claim thereunder. And it was further provided (by the 4th condition), that, "in every case when a new premium should become payable, the directors should be at liberty to terminate the risk, by refusing to accept such premium," &c.

A. duly paid the premiums under this policy down to the year 1855. On the 27th of January, 1856, an accident happened to him, which caused his death on the 1st of February following. On the 4th of February, the company had notice of the death, and a correspondence took place between their secretary and the attorney for A.'s executors respecting the cause of the death and their claim on the policy, neither party at first knowing that the premium which became due on the 22d of January, 1856, was unpaid. On the 8th of February, the secretary for the first time became acquainted with the fact of the non-payment of the premium, but did not communicate it to the executors or their attorney until the 13th (the day after the expiration of the twenty-one days allowed by the 1st condition for payment of the premium), when he informed the latter by letter that the directors had considered and rejected the claim:—

Held,—first, that there was nothing in the conditions to enable the executors of A. to pay the premium after his death, and that, if they had tendered it within the twenty-one days, the company would not have been bound to accept it:

Secondly, that the policy was, by reason of the non-payment of the premium within the terms of the policy and conditions, absolutely void; and that the company were not estopped from denying the payment:

Thirdly, that neither the plaintiffs nor the assured (had he been living) would have had an absolute right to keep the policy alive by payment or tender of the premium within the twenty-one days,—the 4th condition giving the directors the option of refusing to continue it or not, at their pleasure.

THIS was an action brought by the plaintiffs, as executors of William Warre Simpson, deceased, to recover the amount of a policy effected on the life of the testator with the Accidental Death Insurance Company.

The declaration stated, that, theretofore, and before this suit, and in the lifetime of the said William Warre Simpson, the defendants made and entered into a certain policy or contract of insurance with the said William Warre *Simpson, whereby,—after reciting that the said *258] William Warre Simpson, thereafter and hereinafter called the “said insured,” had delivered into the office of the defendants a declaration in writing bearing date the 22d of January, 1851, and signed by him, and had agreed that such declaration should be the basis and condition of the contract for the insurance by the said policy intended to be made, and that the said insured had paid to the defendants the sum of 12*l.* as the premium for the said insurance for one year ending the 22d of January, 1852,—it was witnessed and declared, that, if the said insured should receive or suffer bodily injury from any accident or violence on or before the 22d of January, 1852, and subsequently thereto, during the continuance of the said policy, provided he the said insured on or before, *or within twenty-one days after*, the 22d of January which would be in the year 1852, and on or before *or within twenty-one days after* the 22d of January in every succeeding year *so long as the acting directors for the time being of the said company should accept the same*, pay or cause to be paid to the defendants the annual premium of 12*l.*, then, subject as therein and hereinafter, or in the endorsement thereon and hereinafter is mentioned or referred to, the subscribed capital and other funds and property of the said company should, according to the provisions of the deed of settlement of the said company, and subject as aforesaid, be liable to make or pay to the said insured, his executors, administrators, or assigns, at such time or times as after mentioned, the following payments or compensation, that is to say, in case such accident or violence should cause the death of the said insured within three calendar months after the occurrence of such accident or violence, the full sum of 2000*l.*, such sum to be payable to the personal representatives of the said insured within one calendar *259] month after proof satisfactory to the directors *should have been furnished of the death of the said insured in manner entitling them to receive the said sum under or by virtue of the said policy; and, in case such accident or violence should not cause the death of the said *260] insured, [then as therein mentioned and provided] : (a) *and it was in and by the said policy provided that the same was effected

(a) Upon the amendment of the record, as ultimately agreed to at the trial, the words within brackets were omitted, and the following were here inserted,—“immediately, but should cause any bodily injury to the said insured of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits, a compensation in money at the rate of 20*l.* per week during the continuance of such disability, and also, where no medical attendance was provided by the

upon the express condition, that, if any statement or allegation contained in the aforesaid declaration should be untrue, or if any claim for payment of money to be thereafter brought by virtue of the said policy, or in any statement made in support of such claim, or in the information given to the said company in respect thereof, any false or fraudulent representation should be contained, or if the insurance thereby made, or any renewal thereof, should have been or should be obtained through any misrepresentation, concealment, or untrue averment whatsoever, then the said policy, and any renewal thereof, should be void, and all moneys paid or to be paid in respect thereof should be forfeited to the defendants: (a) provided also, (b) that no claim should be payable to the said company under the said policy in respect of death or injury by accident or violence, unless such death or injury should be occasioned by some external and material cause operating upon the person of the said insured, and unless, in the case of death as aforesaid, such death should take place from such accident and violence within three calendar months from the time of the occurrence of such accident or violence: (c) *provided also that notice in writing of any claim to be made against the said company, on account of any accident or [*261

said company as thereinafter and hereinafter mentioned, such further sum, not exceeding 40*l.* in the whole, as would compensate for any medical expenses which should be actually incurred by the said insured in consequence of such injury as aforesaid; such weekly compensation and further sum as last aforesaid to commence to be paid and be payable within fourteen days after proof satisfactory to the directors should have been furnished that the same were justly due or payable respectively under or by virtue of the said policy: And it was in and by the said policy provided, that, in the event of any non-fatal injury occurring to the said insured, it should be lawful for the directors of the said company, if they should think fit, at their own costs, to furnish medicines and medical attendance for the said insured, and, where the same should be so furnished, no moneys should be payable to the said insured by the said company as such compensation for medical expenses as aforesaid: Provided also, and it was by the said policy declared, that, in case the said insured should suffer any such non-fatal injury as aforesaid, and should be taken into any public hospital or infirmary, and attended without any charge to himself or to the said company for or on account of medicines or medical attendance, then and in such case it should be lawful for the said company, if they should think fit, to pay one-half of the said sum of 40*l.* to such hospital or infirmary, and the other half only to the said insured."

(a) "said company"

(b) "and it was by the said policy expressly agreed and declared."

(c) "and unless in the case of non-fatal injury, such disability as afore-

violence, should be given to the said company within one calendar month after the occurrence thereof, if the said accident or violence should have occurred in Great Britain or Ireland, or, if elsewhere, then within three *262] calendar months after such occurrence : (a) provided *also, that the said policy, and the insurance thereby made, should be subject to the several regulations and conditions printed on the back thereof, so far as they might respectively be applicable, in the same manner as if such regulations and conditions were there repeated and incorporated in the said policy with reference to the said insured,— [which said regulations and conditions, so far as the same were or are applicable to the said insured, and the claims of the plaintiffs, were and are as follows, (a)] that is to say,—

“ 1. The premium on this policy is to be paid within twenty-one days

said should begin to be experienced within the space of one calendar month after the happening of such accident or violence: Provided also, that the said company should not be liable, during the continuance of the said policy, in the course of any consecutive twelve calendar months, reckoning from the 22d day of January in one year to the 22d day of January in the year following, to pay more in the whole than the sum of 1000*l.* for any accident or number of accidents which might happen to the said insured, not occasioning death, such last-mentioned sum to include all such weekly payments and such medical expenses as aforesaid, or more than the said sum of 2000*l.* in the whole on any account whatsoever; and that any payment which should be made to the said insured in compensation for or on account of any injury received by him, should be deducted from the said sum of 2000*l.*, in case such injury should subsequently cause the death of the said insured, and the sum of 2000*l.* should eventually be claimed under or by virtue of the said policy: Provided always, that notice of any non-fatal accident or violence, happening to the said insured, on which a claim was intended to be made, if the same should occur in Great Britain or Ireland, should be given to the said company immediately, or, at latest, within ten days from the time of the happening thereof.”

(a) “ Provided always, that, in the event of the said insured going beyond the limits of Europe, or in any other event or contingency which should appear to the directors of the said company to justify such an extension, it should be lawful for the said insured to make a special agreement with them for extending the aforesaid periods of ten days and one calendar month or three calendar months, as the case might be respectively, to such other period or periods as to the said directors might seem reasonable.”

(b) Instead of the words within brackets, “ And the plaintiffs aver that the said regulations and conditions were and are in the words and figures following.”

from the day on which the same shall first accrue or become due; and, provided the same be from time to time paid within such space of twenty-one days, this policy shall not be void, notwithstanding the happening before the expiration of such space of twenty-one days of the event or events upon the happening whereof the amount secured by this policy shall according to the terms thereof become payable :

“ 2. If the premium on this policy be unpaid for the space of twenty-one days next after it shall first accrue or become due, then this policy shall become and be *absolutely void, and the person or persons entitled to the benefit of such policy shall forfeit all his, her, or [*268 their claim on the company under the same :

“ 3. The subscribed capital and other funds and property of the company which for the time being shall remain unapplied and undisposed of, and not applicable to prior claims and demands in pursuance of the trusts, powers, and authorities of the deed of settlement, shall alone be liable to make good and satisfy all claims and demands upon the said company in respect of this policy ; and no director signing a policy, nor any other director, proprietor, or member of the company, his heirs, executors, or administrators, shall be in anywise individually subject or liable to any such claim or demand, or to any process or execution in respect thereof, but shall be and remain liable to pay to the said company so much of the share or shares held by him, her, or them in the said capital as shall not have been paid up ; and that no other person shall on any account whatsoever be in anywise subject or liable to any claim or demand in respect of any policy of insurance to be issued or granted by the company : (a)

*“ 5. No claim shall be payable by the said company in respect of any accident which shall occur out of the limits of Europe, [*264 unless in each case permission from the directors for the insured to pass such limit shall have been previously obtained, and such additional premium paid as shall be required by the directors on account of an extra risk :

“ 6. The company shall not be liable on a claim made in respect of any accident which shall occur to the insured in consequence of his

(a) “ 4. In every case where a new premium shall become payable, the directors shall be at liberty to terminate the risk by refusing to accept such premium ; and shall also be at liberty, previously to accepting any new premiums, to require such further information as they may think fit regarding the insured. And no payment of any such new premium shall suffice to keep on foot or renew a policy, unless the person or persons paying such premium shall take a receipt for the same in writing under the hand of any two of the directors, or of some person or persons duly authorized by the directors to give such a receipt.”

being, or while he shall be, engaged or employed in actual service in any military or naval capacity, or whilst he shall be employed in any mine or quarry, or in the manufacture of gunpowder, or in the service of any railway company, police force, or constabulary force, or, in case of his being or becoming a sea-faring man, in respect of any accident which shall occur to him whilst upon the sea in the course of his occupation, unless in each case such additional premium shall previously have been paid as shall be required by the directors on account of an extra risk :

"7. The company shall not be liable on a claim made in respect of death or injury arising from any surgical operation the necessity for which shall not be occasioned by some such accident or violence as within mentioned, or from duelling or prize-fighting, nor on a claim made in respect of death by suicide, whether influenced by insanity or otherwise, or by the hands of justice, or in respect of any injury inflicted intentionally on the insured by himself or with his consent, or of death or injury which may happen to him while acting in breach of the law, or which may be occasioned by the wanton and voluntary exposure of himself to obvious and unnecessary risk or injury :

"8. In case of difference of opinion as to the amount of compensation payable in any case, the question shall be referred to the arbitration of a person to be named by *the secretary for the time being *265] of the Master of the Rolls ; and all expenses and costs shall be subject to the decision of such arbitration : and the award made on such arbitration is to be taken as a final settlement of the question, and may be made a rule of court : (a)

"11. Before payment of the sum insured by any policy, proof satisfactory to the directors shall be furnished of the death or deaths, injury or injuries, accident or accidents, or other event or events on which such sum shall become payable, together with such further evidence or information (if any) as the directors shall think necessary to

(a) "9. All premiums and other moneys which shall have been paid to the company in respect of any policy which may have become void, shall, subject to the preceding regulations and conditions, be forfeited to the company ; and all claims upon the company in respect of such policy shall cease and be absolutely void.

"10. In all cases where any policy shall, either originally or at any time after its commencement, be or become subject to any mortgage or mortgages, trust or trusts whatsoever, the receipt of the mortgagee or mortgagees, trustee or trustees for the time being for the money which may become payable in respect of such policy, shall, notwithstanding any equitable claim or demand whatsoever of the person or persons beneficially entitled to the policy, be an effectual discharge to the company and all proprietors and members thereof."

establish the claim, and, particularly, if required by the directors, a medical or other agent of the said company is to be admitted to see the person killed or injured, and to examine the wound or injury received by him, when and as often as in the opinion of the directors it may be necessary :

"12. Every policy granted by the company is granted *upon the terms and conditions comprised in the deed of settlement [*266 upon which the company is formed, the provisions of which shall have the same force and effect as if inserted in the policy."

Averment, that the said declaration hereinbefore mentioned, together with certain questions and answers to which the same had reference, were and are as follows, that is to say,—

"The person proposing to effect the insurance must state—

"His name	William Warre Simpson.
"Residence	3, Cresswell Park, Blackheath.
"Profession, business, or occupation	Russian Broker.
"The name of an intimate friend to be referred to, and how long he has known him	Name, Charles S. Paris, Esq. Address, Salvador House. Has known me several years.
"The sum to be insured	Two thousand pounds.
"1. Where were you born, and when?	Saint Petersburg, 1797.
"2. Are you married or single?	Married.
"3. Are you, or have you ever been, afflicted with epileptic or other fits?	No.
"4. How long have you followed your present occupation?	Thirty years.
"5. Is there any circumstance or information touching your profession, business, occupation, or habits of life, with which the directors ought to be made acquainted, as rendering you peculiarly liable to accidents?	No.

Declaration.

"I, the above-named William Warre Simpson, being desirous of effecting an insurance with The Accidental Death Insurance Company for the sum of 2000*l.*, do *hereby declare that the answers to the above questions are true; and I agree that the questions and [*267 answers taken together shall be the basis of the contract between the said company and me, and that, if any false statement or misrepresentation be contained in any of the said answers, or if there be any wilful omission therein or concealment of any fact which ought to be made known to the directors of the said company, all moneys paid to them on account of such assurance shall be forfeited, and the assurance itself shall be null and void to all intents and purposes. Dated the 22*d* of January, 1851. (Signed) "WILLIAM WARRE SIMPSON."

And the plaintiffs further said, that the said declaration so referred to in the said policy was and is in all respects true, and that the terms

and provisions of the said deed of settlement, so far as the same were applicable to policies of the said company, were in all respects the same as and no other than the terms and provisions of the said policy thereinbefore set forth; that the said policy remained and continued in full force up to and until the death of the said William Warre Simpson as thereafter mentioned; that, whilst the said policy was so in force as aforesaid, the said William Warre Simpson received and suffered bodily injury from an accident within the meaning of the said policy, which said accident caused his death within three calendar months after the occurrence of the said accident; (a) that proof satisfactory to the said directors was furnished of the death of the said William Warre Simpson, more than one calendar month before suit, together with such further evidence and information as the directors thought necessary to *268] establish the claim, and the medical agent of *the said company was admitted to see the said insured, and to examine the injury received by him, when and as often as in the opinion of the directors it was necessary; that the death of the said insured was occasioned by an external and material cause operating within the meaning of the said policy and as therein provided; that notice in writing of the plaintiff's claim on account of the said accident, was given to the defendants within one calendar month after the occurrence thereof, and before this suit, the said accident having occurred in Great Britain; and that the said accident did not occur in consequence of the said insured being, or whilst he was, engaged or employed in actual service in any such capacity as in the said printed regulations and conditions mentioned, or whilst he was employed in any mine or quarry or otherwise as therein also mentioned, or whilst he was upon the sea in the course of his occupation as above mentioned, nor did his said death arise from any surgical operation the necessity for which was not occasioned by such accident or violence as aforesaid, or from duelling or prize-fighting, nor was the claim of the plaintiffs one made in respect of death by suicide, or by the hands of justice, or in respect of any injury inflicted intentionally on the said William Warre Simpson by himself or with his consent, or of death or injury which happened to him while acting in breach of the law, or which was occasioned by the wanton and voluntary exposure of himself to obvious or unnecessary risk or injury; that no difference of opinion had ever arisen between the plaintiffs and the defendants as to the amount of compensation payable in this behalf; and that, although all conditions precedent had been performed, and all things had been done and happened, and all times had elapsed, so as to entitle the plaintiffs to maintain this suit, and although the subscribed capital *269] and other funds and property of the said company *for the time being remaining unapplied and undisposed of and not applicable

(a) "and within twenty-one days after the 22d of January, 1856."

to prior claims and demands in pursuance of the trusts, powers, and authorities of the said deed of settlement, at all times were and still remained sufficient to make good and pay to the plaintiffs the said sum of 2000*l.*,—of all which premises the defendants had always had notice,—yet no part of the said sum of 2000*l.* had ever yet been paid: and the plaintiffs claimed 2500*l.*

The defendants pleaded,—first, that, before the said William Warre Simpson received or suffered such bodily injury from accident as in the declaration alleged, and before the death of the said William Warre Simpson, to wit, on the 22d of January, 1856, one of the said premiums of 12*l.* on the said policy, payable as aforesaid, accrued and became and was due, and the same remained and was unpaid for the space of twenty-one days next after it first accrued and became due, and had never been paid; whereby the said policy became and was and is void; and that all claim on the defendants in respect thereof for the said 2000*l.* ceased.

And, for a third replication to the said plea, upon equitable grounds, the plaintiffs said, that the day on which the said premium became due as in the said plea mentioned, was the 22d of January, 1856, and that the said William Warre Simpson died, as in the declaration mentioned, on the 1st of February, 1856; that the said William Warre Simpson had in his lifetime fully intended to pay the said premium within the said period of twenty-one days after the said 22d of January, 1856, but had not done so at the time of his death, and that, from that time until after the expiration of the said last-mentioned period, there were no executors, administrators, or assigns of the said William Warre Simpson in existence legally authorized or entitled to pay the said premium, or to deal or intermeddle with the said *William Warre Simp- [*270 son's personal estate or effects; that it was impossible for the said William Warre Simpson, his executors, administrators, or assigns, to pay the said premium during the said last-mentioned period; and that, from the time when probate of the said will of the said William Warre Simpson was granted, the plaintiffs, as such executors as aforesaid, had always been and were ready and willing to pay and allow the said premium to the defendants in the usual way, together with interest thereon at the rate of 5*l.* per cent. per annum (if required) from the time when the same first became payable,—of which premises the defendants had always had notice.

Demurrer and joinder.

The demurrer was argued in Hilary Term last, by *Hawkins*, in support of it, and *Byles*, Serjt., contra.

The points urged on behalf of the defendants, were,—First, that, as by the policy, it was expressly conditioned that the annual premium should be paid on or before or within twenty-one days after the 22d of January in every succeeding year so long as the acting directors for

the time being of the company should accept the same, the fact of the testator having died between the 22d of January, 1856, and the twenty-one days after it, and of there being no executors, administrators, or assigns of the testator in existence authorized to make the payment, the facts stated in the replication, constituted no excuse or discharge at law or in equity for the non-payment of the premium on the 22d of January, 1856, or within the twenty-one days afterwards,—Secondly, that the replication showed no answer at law or in equity to the defendants' plea: and the following authorities were cited,—*Sparks v. The Liverpool Water Works Company*, 13 Ves. 428, *Davis v. Thomas*, 1 *271] **Russ. & M.* 506, *Job v. Banister*, 2 Kay & J. 374, *Pearson v. The London & Croydon Railway Company*, 14 Sim. 541, and *Burgh (or Bird) v. Legge*, 5 M. & W. 418,† 7 Dowl. P. C. 814.

The points urged on behalf of the plaintiffs were,—First, that the third replication was a good answer to the plea, inasmuch as it disclosed circumstances which in equity entitled the plaintiffs to be relieved from the forfeiture of the policy,—Secondly, that as, by the terms of the policy, the premium might have been paid by the representatives of the deceased within twenty-one days after the 22d of January, and as such payment became impossible by inevitable necessity, the plaintiffs ought in equity to be relieved against the forfeiture, and allowed the benefit of the policy: and the following cases were cited,—*Eaton v. Lyon*, 3 Ves. 689, *Firman v. Lord Ormonde*, *Beatty (Irish)*, 347, and also the 83d, 84th, and 85th sections of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

After argument, the plaintiffs obtained leave to amend their replication, but ultimately they declined to avail themselves of it, and the defendants had judgment on the demurrer.

The cause went down for trial upon the issues of fact, which were as follows:—

Second plea,—that the said accident did not cause the death of the said W. W. Simpson.

Third plea,—that the death of the said W. W. Simpson was not occasioned by any external and material cause operating upon his person.

The plaintiffs took issue on the second and third pleas.

First replication, to the first plea,—that the defendants ought not to *272] be admitted or received to plead *the said first plea, or to make the allegations therein contained, because the plaintiffs said that the day on which the said premium became payable as in the said first count mentioned was the 22d of January, 1856, and that the said W. W. Simpson died on the 1st of February, 1856; and that, from the time of his death until the expiration of twenty-one days next after the said 22d of January, 1856, the plaintiffs were in communication both by letter and otherwise with the defendants upon the subject of the said

policy and of the death and the cause of the death of the said W. W. Simpson, and the claim which is now made by the plaintiffs in this action: that, in the course of and during such communications, the defendants by their conduct caused the plaintiffs to believe, and the plaintiffs accordingly did believe, and acted upon the belief, that the said policy was in full force and effect for the year ending the 22d of January, 1857: that the plaintiffs had no means of ascertaining, and did not nor could in fact ascertain, from any documents of the said W. W. Simpson, or otherwise than from the defendants themselves, whether or not the said premium had been paid or the said policy was in force for the year ending the 22d of January, 1857: and that, if they, the plaintiffs, had known that the said premium had not been paid, and that the policy would not be in force for the said last-mentioned year, unless the same were paid within the said period of twenty-one days, and if the plaintiffs had not been deceived and misled by the words and conduct of the defendants as in the replication aforesaid, the said premium would have been paid within the said period of twenty-one days.

Second replication, to the first plea,—upon equitable grounds,—that the defendants ought not to be allowed to plead the said first plea, because the plaintiffs said that the day on which the said premium became payable *as in the said plea mentioned, was the 22d of January, 1856, and that the said W. W. Simpson died on the [273 1st of February following; and that, from the time of the death of the said W. W. Simpson until after the expiration of the said period of twenty-one days in the said plea mentioned, the plaintiffs were in communication both by letter and otherwise with the defendants upon the subject of the said policy and of the death and the cause of the death of the said W. W. Simpson, and of the claim which is now made by the plaintiffs in this action: that, throughout the whole course of those communications, the defendants led the plaintiffs to believe, and the plaintiffs did accordingly believe, that the said policy was in full force and in effect for the year ending the 22d of January, 1857, and that they, the plaintiffs, so considered it, and that there was no question between the plaintiffs and defendants as to the said policy being in full force and effect for that year, and that the only questions between the plaintiffs and defendants were whether the said accident did or did not cause the death of the said W. W. Simpson, and whether his death was or was not occasioned by any external or material cause operating upon his person: that they, the plaintiffs, had no means of ascertaining otherwise than from the defendants themselves whether the said premium had been paid by the said W. W. Simpson in his lifetime; and that it was entirely owing to the premises in the replication aforesaid, and particularly to the conduct of the defendants in the course of the said communications, that the said premium was not duly paid within the said period of twenty-one days: that they, the plaintiffs, were in fact

misled and deceived by the conduct of the defendants, and that the defendants intended to mislead and deceive them in that behalf, for that (amongst other things), immediately after the expiration of the said *274] period of twenty-one days, when it was just too *late (according to the strict terms of the said policy) for the plaintiffs to pay the said premium, the defendants intimated to the plaintiffs for the first time, and in the course of communications which were then passing with respect to the aforesaid question, that the policy was not in existence, they the defendants having during the whole of the said previous communications led the plaintiffs to believe the contrary, and to deal with them the defendants upon that belief and understanding: and that they the plaintiffs on their part had always kept good faith with the defendants, and had been and were then ready and willing to allow the said premium, with interest, to the defendants, by way of deduction as aforesaid,—of which premises the defendants had always had notice.

The defendants joined issue on these replications.

The cause came on for trial before Cockburn, C. J., at the sittings in London after Hilary Term last, when the following facts appeared in evidence:—The plaintiffs were the executrix and executors of William Warre Simpson, who in his lifetime resided at Abbey Wood in the county of Kent, and carried on the business of a Russia broker in Crown Court, Old Broad Street, London. The defendants are an insurance company legally incorporated, and established for the purpose of insuring against accidents, and carrying on business at No. 7, Bank Buildings, Lothbury.

On the 22d of January, 1851, Simpson effected with the defendants a policy in the terms set out in the declaration; and the premiums on that policy were regularly paid as they became due, in the years 1852, 1853, 1854, and 1855.

On the 27th of January, 1856, an accident happened to Simpson which caused his death on the 1st of February following. A question was raised at the trial, under the issues joined on the second and third *275] pleas, whether *Simpson died in consequence of an accident within the meaning of the policy: but this was disposed of by the finding of the jury in the affirmative.

Three days after Simpson's death, viz. on the 4th of February, his executors handed the policy to Mr. Crowdy, who was acting as their solicitor, with instructions to take the necessary steps for obtaining the amount from the company; and Mr. Crowdy accordingly on that day addressed a letter to their secretary, Mr. Young, as follows:—

“17 Serjeants' Inn, Fleet Street,

“February, 4th, 1856.

“Sir,—Mr. W. Warre Simpson, of Cronstadt House, Abbey Wood, Kent, who was insured in your office for 2000*l.*, by policy No. 868*½*, died on Friday last in consequence of a severe fall, and burns and other

injuries resulting therefrom, which took place on Sunday evening the 27th of January last. His executors, observing by the policy that notice has at once to be given to your office, desire me to communicate this fact to you, and to add that the funeral will take place on Thursday next; but that it is found desirable to close the coffin this evening; but that, on hearing that you wished your medical officer to inspect the body (if such be your usual practice), it can perhaps be kept open until to-morrow, though longer delay is undesirable. The executors have only just seen the policy, or would have given you this intimation sooner, although in fact only one business day has now elapsed since the death.

Yours, &c.,

"W. YOUNG, Esq.

"JAMES CROWDY."

"Secretary to the Accidental Death Insurance Co."

On the 5th of February, Mr. Young returned Mr. Crowdy the following answer:—

*"Accidental Death Insurance Company, [^a276
"7, Bank Buildings, Lothbury.

"5th February, 1856.

"Sir,—I have to acknowledge receipt of your letter of yesterday. Our surgeon went down to Abbey Wood yesterday afternoon to view the body of the late Mr. W. W. Simpson; and I have just heard from him, that, before he can decide whether a post-mortem examination will be necessary, he must see Mr. Simpson's surgeon's certificate of the cause of death. You will, therefore, see the necessity of returning the enclosed form filled up immediately.

"Yours, &c.

"To Mr. JAS. CROWDY."

"WILLIAM YOUNG."

On the same day (the 5th), the form of certificate enclosed in Mr. Young's letter was duly filled up and signed by Mr. A. Kingdon, the surgeon who had attended Mr. Simpson from the time when the accident occurred until he died; and that certificate was then duly returned by Mr. Crowdy to the defendants' office.

Up to the time of Mr. Simpson's death, neither he nor the defendants had expressed any intention of discontinuing the said policy. The policy had been effected in the first instance by one of the defendants' country agents, who resided in the neighbourhood of Abbey Wood; and the premiums for the previous years had usually been paid to this agent by Mr. Simpson, upon the company's receipt.

The company were in the habit of sending down to their country agents printed forms of receipt for the premiums becoming payable from time to time within each agent's district; and the agent then received the money upon these receipts, and transmitted it to the defendants' office in London. In accordance with this usage, the defendants had sent to their agent for the Abbey Wood district the

*277] printed form of receipt for Mr. *Simpson's premium; and that printed form was after Mr. Simpson's death returned to them by the agent on the 8th of February, with an intimation that the premium had not been paid. Up to this day,—the 8th of February,—the secretary had no reason to doubt that the premium had been duly paid.

On the 11th of February, a meeting of the board of directors, who had the management of the affairs of the company, took place; and the secretary mentioned to them at that meeting the subject of Mr. Simpson's policy. All other business which was brought before the directors was then disposed of; but a special meeting was fixed for the 13th of February (the day after the twenty-one days would have expired), for the further consideration of Mr. Simpson's policy.

The special meeting was accordingly held on the 13th, when the matter was considered by the board; and the result was, that a resolution was passed by the directors, the effect of which was communicated by Mr. Young to Mr. Crowdy by a letter of that date, of which the following is a copy:—

“Accidental Death Insurance Company,
“7, Bank Buildings, Lothbury,
“13th February, 1856.

“Policy No. 868².

“Sir,—I am directed to inform you that the case of the late Mr. Simpson has been considered this day, and that the board are of opinion that no claim is payable under the above policy.

“Yours, &c.,

“WILLIAM YOUNG.”

To this letter Mr. Crowdy replied as follows:—

“17, Serjeants' Inn, Fleet Street,
“February 14th, 1856.

“Policy No. 868².

*278] “Sir,—I am in receipt of your letter informing me *that your board are of opinion that no claim is payable under the above policy. May I beg the favour of your informing me upon what grounds the board propose to dispute a claim which appears to be such a clear one upon the certificates and evidence which have been furnished to you?

“Yours, &c.,

“W. YOUNG, Esq.,

“JAMES CROWDY.”

“Secretary to the Accidental Death Insurance Co.”

On the 19th of February, Mr. Young addressed the following letter to Mr. Crowdy:—

“Accidental Death Insurance Company,
“7, Bank Buildings, Lothbury,
“19th February, 1856.

“Sir,—I have laid your letter of the 14th instant before the board,

and am directed to say that it is not usual, nor can it be expected that they should enter into the reasons which have guided them in arriving at their decision communicated to you in my letter of the 13th instant.

"Yours, &c.,

"JAMES CROWDY, Esq.,

"WILLIAM YOUNG."

To this letter Mr. Crowdy replied on the 20th, as follows:—

"17, Serjeants' Inn, Fleet Street,

"February 20th, 1856.

"Policy on life of Mr. W. W. Simpson.

"Sir,—I have received your letter of yesterday, stating that it is unusual and cannot be expected that your directors should enter into their reasons for resisting the claim under this policy. I cannot help observing hereon that I believe it is not only *not unusual*, but that it is *very usual* for insurance offices to offer at all events *some* *reason whenever they repudiate their liability to a claim which, as in [*279 this case, is, to say the very least, *prima facie* a fair and just one, upon the certificates sent into your office. If, however, the directors are unable to give their reasons, or determine upon withholding them from Mr. Simpson's family, I will not here raise any further discussion upon the fairness of such a mode of proceeding.

"I shall feel obliged by your allowing me to take a copy of the proposal originally sent in by Mr. Simpson for this insurance, and will send or call in the course of to-morrow for that purpose.

"Yours, &c.,

JAMES CROWDY."

"W. YOUNG, Esq.,

"Secretary to the Accidental Death Insurance company."

Again, on the 20th of March, Mr. Crowdy addressed Mr. Young, as follows:—

"17, Serjeants' Inn, Fleet Street,

"March 20th, 1856.

"Policy on life of Mr. W. W. Simpson.

"Sir,—I must beg the favour of a reference to the solicitors to your office, as I have received instructions from Mr. Simpson's executors to take proceedings upon this policy. I regret that my clients should be forced to this course by the most extraordinary and unusual course of a refusal to pay, without one word of reason assigned for such refusal.

"Yours, &c.,

"JAMES CROWDY."

"W. YOUNG, Esq.,

"Secretary to the Accidental Death Insurance Co."

It did not appear that the defendants had ever intimated, either to Mr. Crowdy or to any other person on behalf of the plaintiffs, that the

*280] premium on the policy *had not been paid, or that it was on that account that the claim upon the policy was resisted,—the only question ever raised by them previously to the commencement of this action (on the 9th of April, 1856), being, that which was made the subject of the second and third pleas, viz. whether Mr. Simpson died from an accident within the meaning of the policy. The plaintiffs and their attorney consequently supposed that this was the only question at issue. If they had been informed by Mr. Young that the premium had not been paid, they would have paid it before the expiration of the twenty-one days.

The Lord Chief Justice, in his summing up, told the jury that the substantial question for them upon this part of the case was, whether the defendants wilfully and fraudulently misled the plaintiffs as to the fact of the premium not having been paid, and whether the consequence of so misleading them was to prevent them from paying the premium before the expiration of the twenty-one days.

The jury found that the defendants intentionally withheld from the plaintiffs the fact of the non-payment of the premium, from the 8th of February; that the plaintiffs were misled by the letter of the 5th of February, and thereby induced to make no further inquiries; but that, if they had made further inquiries, they might have ascertained the fact.

In answer to a question from the Lord Chief Justice, the jury also stated that they used the word "intentionally" as being a milder expression than "wilfully and fraudulently;" but that they found that the defendants withheld the fact of the non-payment of the premium, for the purpose of bringing about the result which followed, viz. that the plaintiffs did not pay the premium within the twenty-one days.

Upon this finding, his Lordship directed a verdict to be entered for *281] the plaintiffs upon the issues raised on the *first and second replications to the first plea,—reserving leave to the defendants to move to set aside that verdict and enter a verdict for them upon those issues.

A verdict having accordingly been entered for the plaintiffs for 1988*l*,

Hawkins, in Easter Term last, obtained a rule calling upon the plaintiffs to show cause why the verdict found for them on the replications to the first plea should not be set aside, and instead thereof a verdict be entered for the defendants thereon; or why judgment should not be entered thereon for the defendants non obstante veredicto; or why the entry of final judgment on the verdict entered on such replications should not be stayed; or why there should not be a new trial, on the grounds,—that the privilege of paying the premiums within the twenty-one days after the 22d of January was the privilege of the insured alone, and that the executors had no power or privilege to pay after his death,—that, the assured having died within the twenty-one

days after the 22d of January, 1856, without having paid the premiums, the policy was void,—that the directors of the company had power to refuse the premium, and that payment of the premium, to be of any effect, must be accepted by the directors, and a receipt given by them,—that the replications afford no answer to the first plea,—that they depart from the declaration,—that they were not proved by the finding of the jury,—that there was no duty on the defendants to inform the executors that the premium was not paid, and the omission to inform them of that fact, even though intentional, was no answer to the plea,—that there was no evidence of any wilful concealment on the part of the directors,—and that the verdict was against the evidence.

Byles, Serjt., *James Wilde*, Q. C., and *Garth*, showed *cause. [*282
—The second and third pleas having been disposed of by the finding of the jury, and the third replication by the judgment of the court, there only remained to be considered the first plea, and the first and second replications thereto. The first question is, whether the plea is a good answer to the declaration. The substance of the plea, is, that, before the assured received the injury which resulted in his death, and before the death, one of the premiums of 12*l.* on the policy became due, and that the same remained unpaid for twenty-one days, whereby the policy became void. At the time of the death of the assured, the 2000*l.* would have been due provided the 12*l.* had been paid. The twenty-one days allowed by the terms of the first condition for the payment of the annual premium not having then expired, there was then due to the plaintiffs from the company 2000*l.* subject to the payment of 12*l.* within twenty-one days. Was it necessary that the 12*l.* should be actually paid? Would it not be enough that the executors were ready to deduct that sum from the amount due to them? In truth, the twenty-one days are covered by the premium for the preceding year. [*WILLIAMS*, J.—You contend that the policy covers a year and twenty-one days, for the single premium?] For the first year. [*WILLIAMS*, J.—When does the second year commence?] From the end of the twenty-one days. The only object of the twenty-one days, was, to keep the assured protected for that extended time. In *Doe d. Pitt v. Shewin*, 3 Campb. 184, a tenant held premises under a lease in which there was a covenant to insure and keep insured a given sum upon the demised premises. He effected an annual policy on the premises with an insurance company in the usual printed form, by which it was declared that the policy should be for such longer period as the tenant should regularly pay and the company receive the premium; and a space of fifteen days beyond the *quarter days [*283 was given for payment of the premium, during which time the company was liable: the year expired on the 25th of March, 1811, but the tenant did not pay the premium for a renewal, till the 25th of April following: the company then gave a receipt for the premium, stating

the insurance to be from Lady Day, 1811, to Lady Day, 1812 : and it was held that the covenant was broken by reason of the non-payment of the premium on or before the 9th of April, and that the lease was forfeited, upon a clause of re-entry. Lord Ellenborough says : " There was an interval during which the insurance was discontinued. The fifteen days, *which are an excrescence from the preceding year*, expired on the 9th of April. The policy then became extinct, and the landlord was deprived of all protection till the 25th of that month. A fire might have happened in the meantime ; and there is no pretence for saying that in that case the Phoenix office would have been liable. For a certain period the landlord ran the risk of fire, and the sum of 800*l.* was not kept insured upon the premises in any office. It may admit of considerable doubt whether by the revenue laws the policy could be lawfully renewed by the payment of the premium after the expiration of the fifteen days. At any rate, its existence was suspended from the 9th to the 25th of April. The covenant to insure was, therefore, broken ; and the landlord is entitled to recover at law, whatever relief there may be for the tenant in equity." [CRESSWELL, J.—There was an express insurance there for a year and fifteen days.] Provided the premium for renewal was paid within the fifteen days. [CRESSWELL, J.—I do not so read it.] There is this important provision at the beginning of the fourth condition,—“ In every case where a new premium shall become payable, the directors shall be at liberty to terminate the risk, by refusing to accept such premium ; and shall also be at liberty, *284] previously to accepting any *new premium, to require such further information as they may think fit regarding the insured.” [COCKBURN, C. J.—Suppose they ask for information, and find that the insured has met with an accident likely to result in death, may the company then refuse to receive the premium? WILLIAMS, J.—The information might be as to habits of life rendering him an ineligible subject for insurance. *Milward*.—Or as to his occupation.] The company must at all events be liable until the expiration of the twenty-one days. [COCKBURN, C. J.—If the party means to drop the insurance, and meets with a serious accident within twenty-one days after the expiration of the year of insurance, he may, according to your argument, tender the premium which he never intended to pay, and so make the company liable?] The first condition admits of no other construction. [COCKBURN, C. J.—Is not this the true construction of the first and fourth conditions, taken together,—If the insured chooses to renew the policy, he may do so by paying the premium within the twenty-one days, provided the directors do not exercise the option given them of terminating the risk by refusing to receive the money ; and, in that case, the company shall be liable notwithstanding the happening before the expiration of the twenty-one days of the event upon the happening of which the money secured by the policy becomes payable?]

Any other construction than that which makes the twenty-one days part of the portion of time covered by the insurance, renders the reservation of that period useless. If this was not an existing policy during the twenty-one days, it could not be revived. It is submitted that it was a continuing policy at the time of the death of the insured, and there was then an inchoate claim against the company,—defeasible, possibly, under the fourth condition. Then, as to the option of the directors, how and when is it to be exercised? When a new premium becomes payable. *Now, the new premium accrues or becomes due on the 22d of January. That appears from the second condition, which provides, that, “if the premium on this policy be unpaid for the space of twenty-one days next *after it shall first accrue or become due*, then this policy shall become and be absolutely void, and the person or persons entitled to the benefit of such policy shall forfeit all his, her, or their claim on the company under the same.” The same meaning must be given to the same words in the fourth condition. If it be optional for the directors to refuse the premium at any time during the twenty-one days, the provision giving the twenty-one days for payment of the premium, which was intended for the benefit of the insured, is altogether nullified. The policy, which is made by the company themselves, must be construed most strongly against them. In *Salvin v. James*, 6 East, 571, by a policy under seal referring to certain printed proposals, a fire-office insured the defendants’ premises from the 11th of November, 1802, to the 25th of December, 1803, for a certain premium, which was to be paid yearly on each 25th of December, and the insurance was to continue *so long as the insured should pay the said premium at the said times, and the office should agree to accept it*: and by the printed proposals it was stipulated that the insured should make all future payments annually at the office *within fifteen days after the day limited by the policy, upon forfeiture of the benefit thereof*, and that *no insurance was to take place till the premium was paid*: and, by a subsequent advertisement (agreed to be taken as part of the policy), the office engaged that all persons insured there *by policies for a year or more had been and should be considered as insured for fifteen days beyond the time of the expiration of their policies*: it was held, that, notwithstanding this latter clause, the assured having, before the expiration of the year, had *notice from the office to pay an increased premium for the year ensuing, otherwise *they would not continue the insurance*, which the assured had refused, the office was not liable for a loss which happened *within fifteen days from the expiration of the year* for which the insurance was made, though the assured after the loss, and before the fifteen days expired, tendered the full premium which had been demanded,—the effect of the whole contract, &c., taken together, being only to give the assured an option to continue the assurance or not during fifteen days after the expiration of the year, by paying the

premium for the year ensuing, notwithstanding any intervening loss, provided the office had not *before the end of the year* determined the option by giving notice that they would not renew the contract. In delivering the judgment of the court, Lord Ellenborough there says,—“The office had the power at any time during the year of saying to the assured, we will not contract with you again: we will not receive from you the premium for another year; and, by such declaration, the object would cease for which the fifteen days were allowed; and, as no premium would be in such case to be received, no indemnity could be claimed in respect of it. The consideration of the indemnity during the fifteen days, is, the premium which may be paid within that period; but, when that cannot be any longer looked to, or expected, the right to the indemnity must determine also. The effect of the third article and advertisement are, to give the parties an option for fifteen days to continue the contract or not; with this advantage on the part of the assured, that, if a loss should happen during the fifteen days, though he have not paid his premium, the office shall not after such loss determine the contract; but that it shall be considered as if it had been renewed: but this does not deprive them of the power of determining *287] the contract at the end of the term, by *making their option within a reasonable time before the end of the period for which the insurance was made. When the premium is received, the effect of it is to give the assured an assurance for another year, to be computed from the expiration of the first policy, and not from the expiration of the following fifteen days, which would be the case if the argument of the plaintiffs' counsel were well founded, that the interval of the fifteen days is not comprised in the policy: if that were so, a new policy and new stamps would be necessary; whereas, according to the present policy, regard being had to its relation to the printed proposals, it is an insurance for one year, and for so long as the parties please, provided the assured pay the annual premium within fifteen days of the expiration of each year; with a restriction of the office alone from determining the policy after the year during fifteen days of the following year, in case a loss should happen during that period.” The language of the conditions here is somewhat different; but the effect was intended to be the same. [WILLES, J.—The conditions do not provide for payment of the premium for renewal by any one but the *assured*. That is the difficulty I feel. CRESSWELL, J.—What answer have you on the record to the first plea? That plea alleges that the premium became due on the 22d of January, 1856, and that it never has been paid.] It would, in effect, be paid by adjustment. The plaintiffs claim 2000*l.* less the 12*l.* premium.

Then, as to the replications. The first replication in substance is, that the defendants are by the conduct of their secretary and agent ~~entitled~~ stopped from saying that the premium had not been paid. [CRESS-

WELL, J.—Where is the evidence that the plaintiffs were intentionally misled? COCKBURN, C. J.—The directors abstained from communicating to the executors the fact of the premium not having been paid, until after the expiration of the *twenty-one days.] It was an [*283 unintentional misleading at first, but became culpable when the directors subsequently were made aware of the true state of things. [COCKBURN, C. J.—Were they bound to give the executors notice that the premium was unpaid? If they had done anything actively to induce the executors to abstain from inquiry, possibly the directors might be estopped from objecting that the policy had dropped. But the question is, whether there is any evidence of conduct on their part which amounts to such a misleading as to excuse the non-payment of the premium.] This is very analogous to the case of *Gregg v. Wells*, 10 Ad. & E. 90 (E. C. L. R. vol. 37), 2 P. & D. 296, where it was held, that the owner of goods, who stands by and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them bonâ fide, cannot recover them from the vendee. The facts of that case were these:—*Gregg*, the owner of the fittings of a public-house, demised them to one *Durham*, who thereupon became tenant of the house to a third party, under an agreement which gave his landlord a lien on the fittings. *Gregg* was present at the execution of such agreement. *Durham* afterwards sold the goodwill and fittings, without *Gregg*'s knowledge or assent, to *Wells*, who, being told by the landlord that *Durham* was his tenant, bought them bonâ fide, in ignorance of *Gregg*'s title, and was accepted by the landlord as tenant in the place of *Durham*. And it was held that *Gregg* could not maintain trover for the fittings against *Webb*. In giving judgment, Lord Denman, who tried the cause, said,—“*Pickard v. Sears*, 6 Ad. & E. 469 (E. C. L. R. vol. 33), 2 N. & P. 488, was in my mind at the time of the trial; and the principle of that case may be stated even more broadly than it is there laid down. A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute *that fact in an action against the person whom he has [*289 himself assisted in deceiving.” Would the principle of that case have been at all varied, if the plaintiff had been ignorant at first that the goods were his, and had allowed the sale to take place after he had become acquainted with the fact? Surely not. In the judgment in *Pickard v. Sears*, the court say that “the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.” [WILLIAMS, J.—The rule in *Pickard v. Sears* is somewhat qualified by the judgment of the Court of Exchequer

as delivered by Parke, B., in *Freeman v. Cooke*, 2 Exch. 654, 663,† which must now be considered as the governing rule. After referring to *Pickard v. Sears*, and *Gregg v. Wells*, and the earlier cases of *Greaves v. Key*, 3 B. & Ad. 313 (E. C. L. R. vol. 23), and *Heane v. Rogers*, 9 B. & C. 577 (E. C. L. R. vol. 17), 4 M. & R. 486, that learned judge says: "Whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been applied, is not now the question; but the proposition contained in the rule itself, as above laid down in the case of *Pickard v. Sears*, must be considered as established. By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself as that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it, as true, the party making the representation would be equally *290] precluded from contesting its truth; and conduct by *negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the *fact*, in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons on the faith of their being so authorized." And he adds,—“In truth, in most cases in which the doctrine in *Pickard v. Sears* is to be applied, the representation is such as to amount to the contract or license of the party making it.” Then, as to the second replication, which is substantially the same as the first, but pleaded on equitable grounds. [WILLIAMS, J.—Can there be an equitable replication to a plea showing a legal objection to the plaintiffs' recovering upon the policy?(a)] The matter alleged in the replication is matter of defeasance, which it was not necessary for the plaintiffs to allege in their declaration. The defendants clearly are liable for having wilfully abstained from removing from the minds of the plaintiffs the delusion under which they knew them to be labouring.

Hawkins and Milward, in support of the rule, were stopped by the court. Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court:—

This was an action by the executors of William Warre Simpson on a policy effected by him with the defendants on the 22d of January, 1851; and the declaration averred that it continued in force at the time of *291] William Warre Simpson's death, and that, while it continued in *force, he met with an accident which within three months after

(a) See *Vorley v. Barrett*, 1 C. B. N. S. 225, 234 (E. C. L. R. vol. 87).

its occurrence, and within twenty-one days after the 22d of January, 1856, caused his death.

The defendants pleaded, that, before William Warre Simpson suffered injury from an accident as alleged, and before his death, to wit, on the 22d of January, 1856, one of the premiums of 12*l.* payable as in the policy mentioned became due, and the same remained unpaid for twenty-one days next after it became due, and had never been paid, whereby the policy became void.

They also pleaded two other pleas, which it is not necessary to notice.

The plaintiffs replied;—first, that the defendants ought not to be admitted to plead the first plea, because they said that William Warre Simpson died on the 1st of February, 1856; and that, from the time of his death until the expiration of twenty-one days next after the 22d of January, the plaintiffs were in communication, both by letter and otherwise, with the defendants, on the subject of the policy and of the death and the cause of the death of William Warre Simpson, and the claim which is now made by the plaintiffs in this action; and that, in the course of and during such communications, the defendants by their words and conduct wilfully caused the plaintiffs to believe, and the plaintiffs accordingly did believe, and acted in the belief, that the policy was in full force for the year ending the 22d of January, 1857; and that they had no means of ascertaining from any documents in their possession whether the premium had been paid or not, &c.

There was a second replication in substance the same.

Upon these replications issue was joined.

There was a third replication, to which the defendants demurred, and upon that judgment was given in their favour.

The cause was tried before the Lord Chief Justice at *the sittings in London, after Hilary Term last, when the jury found, [*292 on the issues raised by the replication, that the defendants intentionally withheld information of the non-payment of the premium from the plaintiffs, from the 8th of February; and that the plaintiffs were misled by the letter of the 5th of February, and were thereby induced to make no further inquiry, while by making further inquiry they might have ascertained the fact; and thereupon the verdict was entered for the plaintiffs, the defendants having leave to move to enter the verdict for them, on the ground that the evidence did not sustain the plea.

A rule nisi was granted in Hilary Term, against which cause was shown in Easter Term: and, after consideration, we are of opinion that the rule should be made absolute to enter the verdict for the defendants.

The evidence given on the trial was, that the deceased had effected an insurance against death or injury from accident, the premium on which was payable on the 22d of January in each year. The deceased

died on the 1st of February. The premium due on the preceding 22d of January was then unpaid. The policy was on the 4th forwarded by the executors, by whom it had been found, to a Mr. Crowdy, the solicitor who acted for them. Mr. Crowdy on the same day wrote to the defendants announcing the death of the assured. On the ensuing day, the secretary of the company wrote to Mr. Crowdy in reply, transmitting a form to be filled up in the ordinary way, and notifying the necessity for the certificate of a medical man as to the cause of death.

This letter was silent as to the premium due on the 22d of January not having been paid. In point of fact, it was at that time unknown to the secretary or the defendants, as it also was to the plaintiffs and their solicitor, that the premium in question had not been paid. It had *293] been left to an agent through the medium of *whom this insurance had been effected, to receive the premium, as was usual in such cases; and the defendants were not aware that it had not been received in due course, till a letter was received on the 7th, calling attention to the death of the assured, and to the fact that the premium remained unpaid. This fact the secretary brought to the knowledge of the board of directors at a meeting on the 11th, when direction was given to him to convene a special meeting of the board on the 13th to consider the subject of this policy. At that meeting the directors resolved to repudiate the claim, on the ground that the premium had not been paid within the twenty-one days; and a letter to that effect was written by the secretary to the plaintiffs' solicitor. This was the first communication made by the defendants to the plaintiffs, that the premium had not been paid; and this, in our judgment, was not evidence to sustain the issue on behalf of the plaintiffs; for, it amounts to nothing more than that the defendants abstained from giving information to the plaintiffs of the non-payment of the premium; and we think that the principle of *Pickard v. Sears* is not applicable to this case.

But the main question argued before us regarded the construction of the policy, the conditions annexed to it, and the right of the executors to keep it alive by paying the annual premium after the happening of the event against which the insurance was effected; it being contended on the one hand that the plea was bad and gave no sufficient answer to the declaration, and that, if the verdict was entered for the defendants, judgment ought nevertheless to be entered for the plaintiffs; and, on the other, that the plea was good, and, if the verdict for the plaintiffs remained undisturbed, judgment ought to be arrested.

The policy declared, that, if the assured should receive or suffer any *294] bodily injury from any accident or violence *on or before the 22d of January, 1852, and subsequent thereto, during the continuance of that policy, provided he, the assured, on or before, or *within twenty-one days after, the 22d of January, 1852, and on or*

before, or within twenty-one days after, the 22d of January in every succeeding year so long as the acting directors for the time being of the said company should accept the same, pay or cause to be paid to the said company the annual premium of 12*l.*, then, subject as therein or in the endorsement thereon was mentioned or referred to, the subscribed capital, &c., should be liable, &c.; and the policy was declared to be subject to the several regulations and conditions printed on the back thereof, so far as they might respectively be applicable, in the same manner as if such regulations and conditions had been incorporated in the policy.

The first, second, and fourth conditions were the material ones, and were as follows:—The first condition is: "The premium on this policy is to be paid within twenty-one days from the day on which the same shall first accrue or become due; and, provided the same be from time to time paid within such space of twenty-one days, this policy shall not be void, notwithstanding the happening before the expiration of such space of twenty-one days of the event or events upon the happening whereof the amount secured by this policy shall, according to the terms thereof, become payable." The second condition is: "If the premium on this policy be unpaid for the space of twenty-one days next after it shall first accrue or become due, then this policy shall become and be absolutely void, and the person or persons entitled to the benefit of such policy shall forfeit all his, her, or their claim on the company under the same." The fourth condition is: "In every case when a new premium shall become payable, the directors shall be at liberty to terminate the risk by refusing to accept such premium; and *shall also be at liberty, previously to accepting any new premium, to require [*295 such further information as they may think fit regarding the insured; and no payment of any such new premium shall suffice to keep on foot or renew a policy, unless the person or persons paying such premium shall take a receipt for the same in writing under the hand of any two of the directors, or of some person or persons duly authorized by the directors to give such a receipt."

It was contended for the plaintiffs that the plea gave no sufficient answer to the declaration; for, that the twenty-one days allowed for the payment of the premium were days of grace, and operated as a prolongation of the time for which the insurance was effected; that the policy had not ceased to exist at the time when the death of the assured occurred; and that, in order to avail themselves of the fourth condition, the directors should have given notice, before the expiration of the preceding year, that they would not renew the policy. The case of *Salvin v. James*, 6 East, 571, was relied on. It was further contended, that payment of the premium was not necessary to keep the policy alive; for, that the event on which the sum insured was to be paid hav-

ing happened within the twenty-one days, it was in effect paid, as the directors might deduct it out of the sum which was in their hands payable to the plaintiffs; and that, if the plea was bad, the plaintiffs would be entitled to judgment, notwithstanding the verdict on the issue joined on the replication might by order of the court be entered in favour of the defendants.

We are of opinion that none of these arguments are well founded.

The policy was to continue provided he, *the assured*, paid the premium within the twenty-one days; and this, we think, did not give his executors the right to pay it after his death; and that the payment of *296] premium *mentioned in the first condition, means, such payment as provided for in the body of the policy; and, consequently, that, even if the plaintiffs had tendered the premium within the twenty-one days, the directors would not have been bound to accept it.

But, if this were otherwise, the second condition appears decisive, viz. that, if the premium is unpaid for twenty-one days after it becomes due, the policy shall be absolutely void; for, we have already said that the defendants were not by their conduct estopped from denying the payment, for that they had not, as alleged in the replication, by their words and conduct wilfully caused the plaintiffs to believe that the policy was in full force till the 22d of January, 1857; and therefore the doctrine of estoppel by conduct could not apply in this case.

We also think that neither the plaintiffs nor the assured, had he been living, would have had an absolute right to keep the policy alive by payment or tender of the premium within the twenty-one days,—the fourth condition giving to the directors the right of keeping alive or renewing a policy, or of refusing to do so, at their pleasure. The case of *Salvin v. James*, 6 East, 571, or rather the dictum of Lord Ellenborough (for, the judgment there was for the defendants on another ground), when carefully examined, confirms this view of the question. That case had been preceded by the case of *Tarleton v. Staniforth*, 5 T. R. 695,—an action on a policy of insurance against fire. The policy was subject to certain articles, one of which was, that the assured “shall pay the premium to the next quarter-day, and for one year more at least, and shall, *so long as the managers agree to accept the same*, make all future payments annually within fifteen days after the day limited by their respective policies, upon pain of forfeiture of the benefit thereof; and no insurance is to take place until *the premium *297] be actually paid by the assured.” A loss by fire happened within fifteen days after the expiration of the time for which the policy was effected. The premium for renewal had not then been paid, but was tendered within the fifteen days. The court held that the policy was void; for that two things were necessary in order to keep it alive, the payment of the premium, and *the acceptance of it by the managers*.

After that decision, an advertisement was published by the managers of the Sun Fire Office, and was never afterwards retracted: it was as follows,—“The managers of this office do hereby inform the public that all persons insured in this office by policies taken out for one year or for a longer term, are and always have been considered by the managers as insured for fifteen days beyond the time of the expiration of their policies; but that allowance of fifteen days does not extend to policies for shorter periods, which cease at six o'clock in the evening of the day of the expiration of the time mentioned in the policies.” Salvin & Co., on the 11th of November, 1802, caused to be effected in the Sun Fire Office a policy for 3000*l.*, on their cotton mill, &c., from the 11th of November, 1802, to the 25th of December, 1803. In November, 1803, the managers gave notice, that, from and after the 25th of December, 1803, they would not continue the insurance without an increased premium, which Salvin & Co. refused to pay. On the 7th of January, 1804, being within fifteen days from the expiration of the time mentioned in the policy, the premises were consumed by an accidental fire; and, on the 18th, Salvin & Co. tendered the increased premium which had been demanded by the office. This was refused; and an action was commenced against the office on the policy. The declaration averred, that, in consideration, &c., the defendants undertook and promised the plaintiffs that their property should be considered by the managers as *insured for fifteen days beyond the time of the expiration of the policy, and that, within the fifteen days, a loss by fire hap- [*298
pened. Plea, non assumpsit. The policy, when produced at the trial, contained a reference to the printed proposals, the third of which was as follows,—“On bespeaking policies, all persons are to make a deposit for the policy, stamp duty, and mark, and shall pay the premium to the next quarter day, and from thence for one year more at least: and shall, *as long as the managers agree to accept the same*, make all future payments annually at the said office within fifteen days after the day limited by their respective policies, upon forfeiture of the benefit thereof; and *no insurance is to take place till the premium be actually paid by the assured*. A special case was stated for the opinion of the court; and, on the argument, the decision in *Tarleton v. Staniforth* was not questioned; but it was contended, that the policy *in this case* must be construed by the advertisement, and that the property was protected by the original policy for fifteen days after the expiration of the year. Lord Ellenborough and the court held, that the third article must be considered as corrected by the advertisement, for, that both could not stand together; that the result was, that the latter part of that article must be considered as applicable to the first year only, and that the option of the managers to continue the policy or not must be exercised before the expiration of the current year; that, if the option to discontinue the policy had not been so exercised, the property would have

been protected during the fifteen days; but that, it having been so exercised, the policy ceased on the expiration of the year, and the plaintiffs could not recover. The former decision, therefore, remained unquestioned; and the fourth condition of the policy now under consideration, being, in substance, the same as the third in that, and being *299] unqualified by anything analogous to the advertisement *published by the Sun Office, both the cases of Tarleton v. Stanforth and Salvin v. James are authorities for saying that this policy expired on the 22d of January, 1856.

The result is, that the plea is good, and therefore there is no ground for entering up judgment for the plaintiff notwithstanding the verdict on the issue joined on the replication to that plea.

Judgment for the defendants

(a) An appeal is (M. T. 1857) pending.

ORCHARD and Another v. SIMPSON. May 7.

By a written contract, the plaintiffs agreed with the defendant to make for him a covering for a tent of very large dimensions, the canvas used to be equal to pattern, and of the market value of 11d. per yard, and the making to be charged at 5d. per yard; and it was agreed, that, if the market value of the canvas should be less than 11d. per yard, the amount (the difference) should be deducted:—Held, that “market value” meant the price in the market to an ordinary consumer, irrespective of the particular contract.

THIS was an action for work and materials, goods bargained and sold and sold and delivered, and money due upon accounts stated. The plaintiffs claimed 200l.

Pleas,—first, except as to 36l. 11s. 2d., never indebted,—secondly, except as to the same sum, payment before action,—thirdly, payment into court of 36l. 11s. 2d.

Replication, joining issue on the first and second pleas, and taking the 36l. 11s. 2d. in satisfaction pro tanto.

The cause was tried before Williams, J., at the second sitting at Westminster in this term. The facts were as follows:—The plaintiffs are tent and marquee makers: the defendant is the proprietor of a place of public entertainment called Cremorne Gardens. In March, *800] 1856, the defendant was desirous of erecting a tent in the *grounds attached to Cremorne Gardens, for the purpose of a flower-show: and, after some preliminary discussion, the following agreement was entered into with the plaintiffs for covering it with canvas:—

“Specification of an agreement made this 29th of March, 1856, between Messrs. Orchard & Cunnington, 107 Brick Lane, Old Street, tent makers, of the first part, and T. B. Simpson, Esq., of the Cremorne Gardens, Chelsea, in the county of Middlesex, of the second part:—

"We, the undersigned, do hereby agree to make a covering for the said wooden frame-work, situate in the Cremorne Gardens, Chelsea, with cotton canvas, equal in quality to pattern, and of the *market value* of 11*d.* per yard, 24 inches wide; 5*d.* to be charged for making up the same according to the plan submitted and explained, making together the sum of 1*s.* 4*d.* per yard of 24 inches: and we hereby agree, that, should the *market value* of the cotton canvas be less than 11*d.* per yard of 24 inches, the amount be deducted from the said sum of 1*s.* 4*d.*

"1. That the roof marked A. shall be covered as specified; each seam shall be one inch wide, sewed with tarred twine, tabling all round six inches wide, made in thirteen pieces 38 feet long, thirteen breadths two feet wide sewed canvas, and laced together; each piece to have 144 galvanized rings worked in with tarred twine for the holes for lacing, &c., 40 screw-hooks and rings to fasten same to frame-work, or as many more as may be necessary.

"2. That roof B. shall consist of twenty-six pieces of the same material, each piece 24 feet long, 13 breadths wide, with holes, ropes, &c., for lacing, thirty large hooks and rings, or as many more as may be necessary to fasten each piece at top, also holes and lines at bottom.

"3. That the walls shall consist of canvas equal to pattern, but of No. 9, and less in price by 1*d.* per yard *run, 2 width; to be fastened with brass hooks-and-eyes at top and at bottom, with [*301 the necessary number of proper pegs and latches.

"4. That roof C. shall consist of two pieces, 24 feet long, thirty breadth two feet canvas, equal to pattern, with rings and hooks to fasten top, lines and holes at bottom, lacing at sides.

"5. We hereby agree to send in one-third of the canvas made up to the roof and walls by Saturday, the 6th of April, 1856, the second delivery of one-third more by Saturday, the 13th of April, and the remaining portion to complete the same by Saturday, the 20th of April, 1856; and, further, we undertake the completion of the whole by the 26th of April, 1856, to the satisfaction of Mr. Simpson, or to forfeit 3*l.* per day so long as the same shall remain unfinished; the said sum to be deducted from the balance to be paid.

"That 100*l.* be paid on the delivery of the first portion, 100*l.* on the delivery of the second portion, and the balance when completed to the satisfaction of Mr. Simpson or whomsoever he may appoint.

"And, further, in consideration of the above prompt payment, we do hereby guaranty that the durability of the materials specified to be used shall last and keep out the water for five seasons; otherwise we undertake the necessary repairs to make it do so, free of cost to Mr. Simpson.

(Signed) "T. G. ORCHARD,
"for Orchard & Cunningham."

The work having been done, and various payments having been made by the defendants to the plaintiffs on account thereof, the latter delivered a bill, in which they gave the former credit for the payments so made, as follows:—

*802] *T. B. Simpson, Esq.

To Orchard & Cunnington.

1856	£	s.	d.
April. Covering framework of pavilion with canvas,			
12 pieces top roof, 55 feet over, 13 breadths wide, 2903 yards at 1/4	193	17	4
1 piece ditto, 55 feet over, 7½ breadths wide, 139½ yards at 1/4	9	6	0
24 pieces side roof, 27 feet 6 in. long, 13 breadths wide, 2860 yds. at 1/4	190	13	4
2 pieces ditto, 27 feet 6 in. long, 7½ breadths wide, 137½ yds. at 1/4	9	3	4
2 end roofs, 27 feet 6 in. long, 26 breadths wide, 476 yds. 2 ft. at 1/4	31	15	6
4 corner pieces, 27 feet 6 in. long, 13 breadths wide, 476 yds. 2 ft. at 1/4	31	15	6
2 gable-ends, 108 yards, at 1/4	7	4	0
36 pieces walls, 2½ yards long, 13 breadths wide, 1287 yds. at 1/3	80	8	9
2 pieces ditto, 2½ yards long, 7 breadths wide, 39 yds. at 1/3	2	8	9
	£556	12	6
Cash received on account	300	0	0
Balance due	£256	12	6

Further payments were afterwards made amounting to 225l., leaving a balance of 31l. 12s. 6d.; and, some extra work having been done by the plaintiffs for the defendant, a second account was sent in, as follows:—

T. B. Simpson, Esq.

To Orchard & Cunnington.

1856.	£	s.	d.
April 11. To account rendered	556	12	6
Cr.			
April 12. By cash	100	0	0
" 19. Ditto	100	0	0
" 26. Ditto	100	0	0
May 9. Ditto	50	0	0
*May 17. Ditto	50	0	0
*808]	400	0	0
	£156	12	6
May 19. Reefing side roofs, as agreed	30	0	0
" 31. Waterproof cloth, 223 square yards, 2/	22	6	0
	£208	18	6

A third account was afterwards sent in, as follows:—

T. B. Simpson, Esq.

To Orchard & Cunnington.

1856.	£	s.	d.
April 11. To balance of tent left due	31	12	6
" 26. Extra galvanized screw-hooks, &c., to fasten gable ends	2	2	0
Extra ditto to fasten walls, &c.	5	0	0
May 16. Reefing side roofs of tent, as agreed, iron blocks, ropes, brackets, &c.	30	0	0
" 31. Fixing 223 yards of oil-cloth round side roof of pavilion, 2/	22	6	0
June 14. Securing side roofs of tent, top roof, &c., new lines, screws, books, &c.	6	10	0
July 8. Securing tent, and decorating ditto with flags, &c., for the licensed victuallers' dinner, &c.	10	0	0
Aug. 29. Attending upon Mr. Simpson, and instructing him how to take down the tent	1	1	0
	<hr/>		
	£108	11	6

The plaintiffs by this action sought to recover this balance of 108l. 11s. 6d. The claim was resisted by the defendant, on the ground, that, by an understanding between the parties *before the agreement was entered into*, the only profit the plaintiffs were to derive from the transaction was 2d. per yard upon the *making* of the tent-covering, and that the canvas was to be charged **for at cost price*; and it was submitted that this was the true construction of the contract [304] itself. And witnesses were called,—two tent-makers, and a dealer in canvas,—who proved that canvas of the qualities used in the making of the tent, and which the plaintiffs had charged for at the rates of 10d. and 11d. per yard respectively, were procurable at 8½d. and 9½d. per yard, or, considering the quantity required, even at a less price. And, all the other items of the plaintiffs' demand being proved or admitted, it was insisted that the balance due to the plaintiffs beyond the sum paid into court was 8l. 6s. 2d. only.

On the part of the plaintiffs, witnesses were called to prove that the "market value" of the canvas used was that charged by them; and it was submitted that those words in the agreement meant, not "cost price," or "wholesale price," but "consumer's price."

The learned judge ruled that the latter was the proper construction of the agreement; and he directed the jury accordingly, and they returned a verdict for the plaintiffs for 67l. 0s. 4d.

Montagu Chambers, Q. C. (with whom was *Wordsworth*), pursuant to leave reserved to him at the trial, on a former day moved to reduce the verdict to 8l. 6s. 2d. He submitted that the plaintiffs were not entitled to charge more for the canvas than they themselves had actually paid to the manufacturer for it. [COCKBURN, C. J.—In effect, you want to import words into the contract, viz. market value *for the large quantity required*.] Precisely so. [COCKBURN, C. J.—"Cost price" would have made it clear.] The expression used being ambiguous, in

construing the contract, regard may be had to the surrounding circumstances.

*305] COCKBURN, C. J.—We will speak to my Brother *Williams before we decide whether the rule should be granted or not.

Cur. adv. vult.

COCKBURN, C. J., now said: We have communicated with my Brother Williams, and we are all of opinion that there is no ground for the application. We think the words “market value” in this contract must be taken to mean the price of the commodity in the market as between the manufacturer and an ordinary purchaser; and that those words are not to receive a different interpretation, because a person requiring so large a quantity as was wanted in this case, might, as was insisted by Mr. *Chambers*, have purchased the canvas at a lower rate. We think the contract is only to be construed to mean, the ordinary price in the market, irrespective of the particular contract. There will therefore be no rule.

Rule refused.

*306] *HODGES and Another v. CALLAGHAN. April 16.

Where a writ of summons is specially endorsed under the 25th section of the Common Law Procedure Act, 1852, and judgment is signed for default of appearance, pursuant to s. 27, after payments made by the defendant on account, the plaintiff is not entitled to sign judgment for the sum endorsed upon the writ, but only for the balance remaining due after giving credit for the moneys paid.

By a special endorsement under the above statute, the plaintiff claimed 34*l.* 11*s.* 7*d.* The defendant, after the issuing of the writ, and before judgment, paid 25*l.* on account, and judgment was signed and execution issued for the full amount, but with a direction to the officer to take the balance only, and costs. The defendant having been arrested and detained under this writ, a judge at Chambers made an order to reduce the amount for which the judgment was signed to the proper sum, and to discharge the defendant from custody, in pursuance of the 7 & 8 Vict. c. 96, s. 57, the sum recovered not exceeding 20*l.*, exclusive of costs:—The court refused to rescind the order.

The arrest took place on the 14th of August, and the application for the defendant's discharge was not made until the 11th of December:—Held, not too late.

A WRIT of summons issued against the defendant on the 5th of December, 1855, at the suit of the plaintiffs, which was specially endorsed with the particulars of the debt, pursuant to the 25th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, as follows:—

“The following are the particulars of the plaintiffs’ claim.

	£	s.	d.
“1855. Sept. 18. To 53½ gallons gin 17. 11/2	29	14	7
2 “ British brandy, 14/	1	8	0
3 “ spirits of wine, 21/4.	3	4	0
2 bottles	0	5	0
	<hr/>		

£34 11 7

“Account stated, £34 11 7.”

Having been served with the writ, the defendant called upon the plaintiffs' attorneys, and proposed to pay the debt and costs by instalments, and subsequently by various instalments paid 25*l.* on account, leaving a balance of 12*l.* 19*s.* 7*d.*

On the 8th of August, 1856, the plaintiffs' attorneys signed judgment for want of appearance for the 34*l.* 11*s.* 7*d.*, the debt endorsed upon the writ of summons, and 3*l.* 8*s.* for costs, and issued a *fi. fa.* on the 14th, endorsed to levy "12*l.* 19*s.* 7*d.* and 1*l.* 9*s.* for costs of execution, and also interest on 12*l.* 19*s.* 7*d.* at *4*l.* per cent. per annum [*307 from the 8th of August, 1856, besides, &c." There being nothing upon the defendant's premises whereon the officer could levy, a *ca. sa.* similarly endorsed was issued on the 14th of August, under which the defendant was on the same day arrested and conveyed to White-Cross Street prison.

On the 11th of December, a summons was taken out calling upon the plaintiffs to show cause why the judgment and *ca. sa.* should not be set aside, and the defendant let in to appear and defend, or why the amount for which judgment was signed and execution issued should not be reduced from 37*l.* 9*s.* 7*d.* to 12*l.* 19*s.* 7*d.*, and why the defendant should not be discharged from custody, on the ground that at the time the judgment was signed the debt due was under 20*l.*, and why the plaintiffs should not pay the costs of and incident to the application. This summons came on to be heard before Cresswell, J., on the 15th of December, when that learned judge made an order to reduce the sum for which judgment was signed to 12*l.* 19*s.* 7*d.*, and for the defendant's discharge from custody, with 1*l.* costs.

Upon an affidavit of these facts, and also stating that the defendant had on the 22d of December commenced an action against the plaintiffs to recover damages in respect of the imprisonment under the *ca. sa.*,

Lush, in Hilary Term last, obtained a rule calling on the defendant to show cause why the above order should not be rescinded. He submitted that the case did not fall within the 7 & 8 Vict. c. 96, s. 57, the fruits of the action exceeding the value of 20*l.*,—referring to *Johnson v. Harris*, 15 C. B. 357 (E. C. L. R. vol. 80), where Williams, J., thought that the true test was, for what amount the judgment was signed. [COCKBURN, C. J.—The object of the statute was, to prevent the arrest of a debtor upon final process for a less sum than 20*l.*] Not where it is the *balance of a larger sum for which judgment has been signed. It is worthy of remark, that, at the time this statute passed, the legislature were about to establish the county courts, with a jurisdiction limited to sums not exceeding 20*l.*; and this will throw some light upon the meaning of the word "recovered" in this act. [WILLIAMS, J.—In the 43 G. 3, c. 46, s. 3, "recovered" means recovered by the judgment.] The special endorsement of the writ [*308

under the 15 & 16 Vict. c. 76, s. 25, is given in substitution of the declaration and particulars of demand. The 27th section enacts, that, "in case of non-appearance by the defendant, where the writ of summons is endorsed in the special form thereinbefore provided, it shall and may be lawful for the plaintiff, on filing an affidavit of personal service of the writ of summons, or a judge's order for leave to proceed under the provisions of this act, and a copy of the writ of summons, at once, to sign final judgment in the form contained in the schedule A. to the act annexed, marked No. 5 (on which judgment no proceeding in error shall lie), for any sum not exceeding the sum endorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs, &c.; and the plaintiff may upon such judgment issue execution at the expiration of eight days from the last day for appearance, and not before," &c. Payments could not be given in evidence in reduction of damages, but must be specially pleaded. The plaintiffs were not bound to give the defendant credit for the sums paid on account, until after judgment. Then, the application is too late. The *fi. fa.* issued on the 3d of August, the *ca. sa.* on the 14th, and the defendant was arrested on the 15th. If there was any irregularity in the proceeding, the defendant was bound to take the objection promptly. Instead of doing so, he lies in prison without making any *309] attempt to obtain his release until the 11th of December. * [WILLIAMS, J.—This is an application to the justice and equity of the court. CRESSWELL, J.—My order was, to reduce the sum for which the judgment and execution were signed and issued, and to discharge the defendant out of custody, not to set aside the judgment.] Its effect was, to set aside the judgment signed, and to sign judgment for a smaller sum.

C. Wood now showed cause.—The order was properly made, the sum to be recovered by the judgment being less than 20*l.* The 57th section of the 7 & 8 Vict. c. 96, reciting "that it is expedient to limit the present power of arrest upon final process," enacts "that no person shall be taken or charged in execution upon any judgment obtained in any of Her Majesty's superior courts, or in any county court, court of requests, or other inferior court, in any action for the recovery of any debt, wherein *the sum recovered* shall not exceed the sum of 20*l.* exclusive of the costs recovered by such judgment." According to the construction put upon the statute by this court in *Johnson v. Harris*, 15 C. B. 357 (E. C. L. R. vol. 80), the defendant was clearly entitled to be discharged, inasmuch as he was detained for a sum not exceeding 20*l.*, and might at any time purchase his liberty by payment of such smaller sum. (a) In Archbold's Practice (by Prentice), p. 641, it is said that "it would seem that the act does not apply to a case where the real

(a) The same argument would apply, and with equal force, if the defendant, having been taken in execution for a larger debt, reduces it by subsequent payments to a sum not exceeding 20*l.*

debt recovered exceeds 20*l.*, and the amount has been reduced below that amount by payment or otherwise since the judgment was recovered." Walker v. Hewlett, 6 D. & L. 732, is exactly in point. There, a writ of summons in debt was endorsed for a sum under 20*l.*: in the declaration *the sum claimed was above 20*l.*: judgment was signed by [*310 default, and a ca. sa. issued: the sum inserted in the judgment, and in the mandatory part of the writ, was the sum claimed in the declaration, but the writ was endorsed to levy 12*l.* only, being the amount of debt and costs: and it was held that this was a case in which "the sum recovered" did not exceed 20*l.*, within the meaning of the 7 & 8 Vict. c. 96, s. 57; and the court accordingly set aside the ca. sa., and ordered the defendant to be discharged out of custody. So, in Blew v. Steinan, 11 Exch. 440,† where the debt was reduced below 20*l.* by payment, before judgment signed, an arrest on a ca. sa. for the entire debt was held irregular. [WILLES, J.—This is the case of a specially endorsed writ under the 27th section of the Common Law Procedure Act, 1852. Under the old practice, the course was, to sign judgment for the amount in the declaration; but, under this section, the plaintiff is authorized, in default of the defendant's appearance, to sign judgment "for any sum not exceeding the sum endorsed on the writ." The plaintiffs should have signed judgment only for the amount actually due, as if there had been a plea of payments puis darrein continuance. Why resort to cases, when you have the express words of s. 27 to rely on, the very object of which was to do away with the technical necessity of signing judgment for the whole amount claimed?]

Lush, in support of his rule.—This case is neither within the letter nor the spirit of the 7 & 8 Vict. c. 96, s. 57. The question is, what have the plaintiffs recovered *by means of the action*? Suppose the defendant were sued for a debt of 10,000*l.*, and, after action brought, paid all but 19*l.*, could it be said that the plaintiffs recovered by means of the action only 19*l.*? [CRESSWELL, J.—Suppose the debt reduced by set-off to 10*l.*, what would *be the amount recovered?] 10*l.* [*311 clearly. But non constat that the set-off will be pleaded. [CRESSWELL, J.—Is it not as much against the policy of the statute that the defendant should be arrested for a large sum where there is a set-off, as it would be if the smaller sum had been the only transaction between the parties? CROWDER, J.—A man who does not owe 20*l.* is not to be deprived of his liberty.] Here, the defendant at the time the action was commenced owed the plaintiffs 34*l.* 11*s.* 7*d.*, and that sum the action has been instrumental in recovering. In Johnson v. Harris, the action, as Crowder, J., observes, was really brought to recover 16*l.* only. Some light is thrown upon the subject by the 8 & 9 Vict. c. 127, which makes provision for the recovery of debts not exceeding 20*l.* for which a judgment has been obtained, by summoning the debtor before a commissioner of bankruptcy, or court of requests, or other inferior

court of record. And it is also worthy of remark that the first county court act was passed in the following session. In *Walker v. Hewlett*, the action was really brought to recover a debt of 2*l.* 19*s.* 10½*d.* only. Suppose this had not been the case of a specially endorsed writ, and a declaration had been delivered claiming the real sum due, 34*l.* 11*s.* 7*d.*, and the defendant had suffered judgment by default,—for what amount would the plaintiffs have signed judgment? Clearly for the whole debt, even though a portion of it had been paid since the commencement of the action, inasmuch as payment could not be given in evidence unless pleaded. [WILLES, J.—The defendant might by pleading the part payment to the further maintenance of the action have prevented the plaintiffs from recovering more than the balance actually due. The language of the 27th section of the 15 & 16 Vict. c. 76, was deliberately intended to prevent the plaintiff from signing judgment for more than the sum actually due.] It does not in terms say that judgment shall *312] be signed only for the sum actually due, but “any sum not *exceeding the sum endorsed on the writ.” There can be no difference in this respect between the special endorsement and the old course of practice. Then, if this is mere irregularity,—as was held in *Blew v. Steinau*, 11 Exch. 440,†—the defendant was bound to come promptly. [CROWDER, J.—Is it mere irregularity to arrest a man for a sum for which the statute says he shall not be arrested?] The real question is, whether the 57th section of the 7 & 8 Vict. c. 96, was intended to apply to a case where the action has actually produced to the plaintiff a sum exceeding 20*l.*

CROWDER, J.(a)—I am of opinion that this rule should be discharged. This is an appeal against an order made by my Brother Cresswell to reduce the sum for which judgment was signed, from 37*l.* 19*s.* 7*d.* to 12*l.* 19*s.* 7*d.*, and to discharge the defendant from custody. It appears that the action was originally brought to recover 34*l.* 11*s.* 7*d.*, that the writ of summons was specially endorsed under the 27th section of the 15 & 16 Vict. c. 76, that no appearance was entered, and that, after payments had been made on account amounting in the aggregate to 25*l.*, judgment was signed for the whole debt, 34*l.* 11*s.* 7*d.* and 3*l.* 8*s.* costs, and the defendant taken on a ca. sa. issued for the entire amount, but endorsed with a direction to the officer to take 12*l.* 19*s.* 7*d.*, with costs of levy, &c. It appears to me that the order was properly made. The judgment should have been signed only for the sum really due, the object of the 27th section of the 15 & 16 Vict. c. 76, being that the case of a want of appearance should be dealt with in the same way as if under the old practice the defendant had appeared and pleaded. The proper meaning of the 27th section, when fairly construed, is, that final judgment may be signed for the sum really due, taking into con-

(a) Cockburn, C. J., was absent, on account of indisposition.

consideration *payments made. If, instead of filing an affidavit of personal service of the writ of summons, a judge's order had [*313 been obtained for leave to proceed (under s. 17), the judgment clearly could only have been entered for the sum actually due. That being so, I am of opinion, that, upon the liberal and proper construction of the 57th section of the 7 & 8 Vict. c. 96, there is no justification for the taking of a defendant in execution for a debt not exceeding 20*l*. The object of the legislature is apparent from the recital "that it is expedient to limit the present power of arrest upon final process;" and the enacting words are large enough to meet such a case as this. The judgment ought to have been entered up for 12*l*. 19*s*. 7*d*. only: the sum recovered in the action, therefore, was a sum not exceeding 20*l*. within the meaning of the statute. For these reasons I am of opinion that the rule to rescind my Brother Cresswell's order must be discharged, but without costs, unless the defendant will undertake to bring no action.

WILLES, J.—I am entirely of the same opinion. This was a proceeding by a writ specially endorsed under the 25th section of the Common Law Procedure Act, 1852, where judgment has been signed for default of appearance, and where therefore there could be no plea. The true construction has, I think, been put upon the statute by my Brother Crowder. It has been contended on the part of the plaintiffs, that, under the 27th section, they might at their election sign judgment for the entire sum mentioned in the endorsement, or for the sum as reduced by payments in the mean time. I am of opinion that that is not the correct construction of the act. Before the passing of the 10 & 16 Vict. c. 76, a plaintiff could only recover in respect of a cause of action alleged in a declaration: and, where payments were made after the commencement of the action, the defendant was allowed to [*314 *plead them to the further maintenance, and the plaintiff could only have had judgment for the balance remaining due. It may be true, that, if the payments had not been pleaded, the judgment would have been taken and execution issued for the whole sum claimed, the levy being limited by the direction to the sheriff to take the true amount due. If the question had arisen upon that course of proceeding, possibly the amendment here made would not have been justifiable, and might have affected the operation of the 57th section of the 7 & 8 Vict. c. 96,—though, as at present advised, I am of opinion that it would not, because the sum which that section deals with, is, the sum which the plaintiff claims and the sum for which the action is brought and the judgment obtained. My impression would be, that the question whether the defendant pleaded payments or not, or whether the plaintiff was bound to give him credit for them, would be altogether immaterial. I do not express any formal or decided opinion upon that point: but it is important that we should not be understood as laying down that the

defendant would not in that case be entitled to be discharged. But, when we come to deal with the 27th section, the case is stripped of all technical difficulties arising from the rules of pleading. Under that section, there are no pleadings: the plaintiff, having endorsed on the writ of summons the amount he seeks to recover, is empowered, in case of non-appearance by the defendant, to sign judgment "for any sum not exceeding the sum endorsed on the writ," with interest and costs. The sum so endorsed may have been reduced by payment; and that is the case in which it was necessary to give the plaintiff the option of signing judgment for the sum endorsed or for any less sum, so as to represent the actual amount due at the time the judgment is signed. It is absurd to suppose that the statute intended to give an option to be *815] exercised at the mere caprice of the plaintiff. The plaintiff ought to represent the court as pronouncing judgment in his favour only for the sum which is really due to him. The 28th section puts the matter beyond all doubt, showing that the word "may" is used with reference to the amount really due: it enacts, that, in the case there provided for, judgment may be signed "and execution may issue for an amount not exceeding the amount endorsed on the writ of summons." If the argument urged by Mr. *Lush* is correct, the word "may" in that section should be in like manner construed as giving the plaintiffs an option as to the amount for which execution shall issue. Upon the whole, it appears to me that the plaintiffs were bound, in signing judgment under the 27th section, to give credit for the intermediate payments; and, that being so, that the sum *recovered* within the meaning of the 7 & 8 Vict. c. 96, s. 57, was the sum remaining due after giving credit for the payments made on account of the debt, viz. 12*l.* 19*s.* 7*d.* The order, therefore, directing the sum for which the judgment was signed to be reduced to that amount, was rightly made; and the judgment being so reduced, it follows that the defendant was entitled to be discharged. The defendant will be entitled also to the costs of the rule, if he will undertake not to bring, or proceed with, an action; otherwise, the rule will be discharged without costs.

CRESSWELL, J.—When this matter was before me at Chambers, I thought it involved a question of considerable doubt and difficulty, and, but for the circumstance of the defendant being in prison, I should have referred it to the court. The difficulties, however, which I entertained have been very much cleared away by the discussion which has taken place, and the judgments which have been pronounced by my two learned Brothers.

Rule discharged accordingly.

***BAYLIS v. LE GROS and Others. April 28. [*816**

The Common Law Procedure Act, 1854, does not authorize the issuing of a writ of injunction in an action of *ejectment*.

THIS was an action of ejectment to recover possession of a factory and premises at Tottenham, in the county of Middlesex. The writ was issued on the 12th of February, 1855, and the cause came on for trial before Jervis, C. J., at the sittings at Westminster after Hilary Term, 1856, when his lordship suggested that a case should be stated for the opinion of the court. A verdict was thereupon taken for the plaintiff, subject to such special case, but the terms thereof were never agreed on. The defendants having in the meantime removed from the premises certain machinery, and being about to remove more, the plaintiff, on the 13th of March last, obtained a judge's order for a writ of injunction, pursuant to the 82d section of the 17 & 18 Vict. c. 125, to restrain them from so doing. The writ was as follows:—

“Victoria, by the grace of God, of the united kingdom of Great Britain and Ireland, Queen, defender of the faith, To Charles Le Gros, Philip Le Gros, William Thompson, John Bird, and James Thompson, of Tottenham, in the county of Middlesex, crape manufacturers, and their agents and servants, and each of them, greeting: Whereas, by an order bearing date the 13th day of March, 1857, and made by Sir John Taylor Coleridge, Knt., one of the justices of the Court of Queen's Bench at Westminster, in a certain action depending in our Court of Common Pleas, wherein James Baylis was plaintiff, and the said Charles Le Gros, Philip Le Gros, William Thompson, John Bird, and James Thompson, were defendants, it was ordered that a writ of injunction issue to restrain the said defendants and their workmen, servants, or agents, from removing the machinery and other *effects* *from a [*817 factory and premises at Tottenham, in the county of Middlesex, in the occupation of the defendants, and from selling and disposing of the same and of that already removed, the said action in which the said order was made being an action brought for the recovery in ejectment of all that messuage, tenement, or factory for the manufacturing, dyeing, and finishing of crapes, situate, lying, and being in Love Lane, Church Road, in the parish of Tottenham, in the county of Middlesex, with all outhouses, buildings, yards, and other appurtenances to the same belonging: We therefore do strictly enjoin and command you the said Charles Le Gros, Philip Le Gros, William Thompson, John Bird, and James Thompson, and your agents and servants, and every of you, under the penalty of 3000*l.*, to be levied upon your and each of your lands, goods, and chattels, to our use, that you and every of you do from henceforth altogether absolutely desist from removing the machinery and other *effects* from a factory and premises at Tottenham, in

the county of Middlesex, in the occupation of the defendants, and from selling and disposing of the same and of that already removed, until our said court shall make order to the contrary. Witness," &c.

On the 16th of March, a summons was taken out, calling upon the plaintiff to show cause why the order of the 13th, and the writ of injunction issued in pursuance thereof, and the copies and service thereof, should not be set aside, with costs. This summons came on to be heard before Coleridge, J., on the 19th of March, when that learned judge made an order referring the order of the 16th to this court, the defendants to give security to reinstate as before removal whatever machinery they should remove which was upon the premises during the lifetime of the plaintiff's testator.

*318] *C. Pollock*, on a former day in this term, obtained a *rule nisi to set aside the order of the 13th of March, and the writ of injunction issued in pursuance thereof, on the grounds,—first, that the Common Law Procedure Act, 1854, did not authorize an injunction in an action of ejectment,—secondly, that, if it did, it could only be granted in those cases where the plaintiff has claimed a writ of injunction in the action itself,—thirdly, that the order was obtained *ex parte* and upon an untrue statement of the facts. He referred to *Gittins v. Symes*, 15 C. B. 362 (E. C. L. R. vol. 80), where it was held that the rule for a writ of injunction to restrain a defendant from infringing a patent, under the 82d section of the Common Law Procedure Act, 1854, is a rule to show cause only in the first instance.

Prentice now showed cause.—The main question is, whether this is a proceeding in which a writ of injunction can be granted. The 79th section of the Common Law Procedure Act, 1854, enacts, that, "in all cases of breach of contract or other injury, where the party injured is entitled to maintain or has brought an action, he may, in like case and manner as hereinbefore [ss. 66—77] provided with respect to mandamus, claim a writ of injunction against the repetition or continuance of such breach of contract, or other injury, or the committal of any breach of contract, or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages, or other redress." The 80th section enacts that "the writ of summons in such action shall be in the same form as the writ of summons in any personal action, but on every such writ and copy thereof there shall be endorsed a notice, that, in default of appearance, the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a writ of *319] injunction." The 81st section enacts *that "the proceedings in such action shall be the same, as nearly as may be, and subject to the like control, as the proceedings in an action to obtain a mandamus under the provisions hereinbefore contained; and, in such action, judgment may be given that the writ of injunction do or do not issue,

as justice may require; and, in case of disobedience, such writ of injunction may be enforced by attachment by the court, or, when such courts shall not be sitting, by a judge." Then comes the 82d section, which enacts that "it shall be lawful for the plaintiff, *at any time after the commencement of the action*, and whether before or after judgment, to apply *ex parte* to the court or a judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the court or judge upon such terms, as to the duration of the writ, keeping an account, giving security, or otherwise, as to such court or judge shall seem reasonable or just; and, in case of disobedience, such writ may be enforced by attachment by the court, or, when such courts shall not be sitting, by a judge: Provided always that any order for a writ of injunction made by a judge, or any writ issued by virtue thereof, may be discharged or varied or set aside by the court, on application made thereto by any party dissatisfied with such order." It will be contended on the other side that these provisions do not apply to ejectment, the interpretation clause, s. 99, declaring that the word "action" shall be understood to mean any *personal* action, which ejectment is not. The 227th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, provides, that, in the construction of that act, the word "action" shall be understood to mean any personal action *brought by writ of summons in any of the superior courts: and in *Messiter v. Rose*, [*820 13 C. B. 162 (E. C. L. R. vol. 76), it was held that the 86th section of that act applied to all pleadings in the superior courts, even though the action were commenced in an inferior court, and removed by certiorari. That case does not seem to have been followed, and therefore the question may still be considered an open one. [WILLES, J.—There is no provision in the act for an injunction until an injury has actually commenced and an action has been brought for it. There is no mode of preventing an apprehended injury. The recommendations of the commissioners in the reports upon which the common law procedure act's were founded were not carried out in this respect.(a)] In the clauses as to *mandamus, ss. 68—77, replevin and ejectment are expressly excepted. As to interrogatories, s. 51 [*821

(a) The suggestions here referred to are found at pp. 74 and 75 of the third report, made in 1831, and in the second report made in 1853, p. 44.

In the former, the commissioners make the following recommendations:—"That, in all cases of injury or breach of contract, or threatened injury or breach of contract, for which an action at law for damages may be maintained (whether such action shall have been commenced or not), application shall, upon proper affidavit, be allowed to be made by way of motion in any of the courts of common law at Westminster, or in vacation time to a judge at Chambers, for a writ of prohibition; and that, if the court or judge shall be satisfied that the case is such that the recovery of damages would be an inadequate remedy, or that the amount of damages could not be

applies to ejectment as well as to other actions. The court will grant *822] a writ of injunction to restrain waste: and, although the *order and the writ use the word "effects," the plaintiff only seeks to restrain the defendant from removing the fixtures. [COCKBURN, C. J.—The appropriate remedy for taking away fixtures is not ejectment, but trespass. WILLES, J.—The plaintiff might recover in the ejectment, and yet the defendants might be entitled to the fixtures.] Then, this rule asks for the costs of the application. [CRESSWELL, J.—Costs are never given on setting aside a judge's order.]

COCKBURN, C. J.—Upon looking at the 79th and 82d and intervening sections of the Common Law Procedure Act, 1854, I am of opinion that they do not apply to ejectment, in which this remedy is only sought because it is alleged that fixtures forming part of the freehold have been taken away by the tenant. The remedy afforded by those provisions is intended "to restrain the defendant in the action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right." That cannot apply to ejectment, which is an action not for an injury in taking away goods, but simply to recover the possession of the premises.

CRESSWELL, J.—Without referring to the variance between the recommendation of the commissioners in their reports and the act

precisely or conveniently ascertained, a rule or order shall be made for issuing a writ of prohibition forthwith, directed to the proper party or parties, prohibiting him or them from the commission or further commission of the acts which are the subject of complaint:

"That such party or parties, upon proper notice to the opposite party, shall be at liberty to move the court or judge to quash the writ of prohibitions so issued; and that, after both parties have been heard upon such motion, it shall be at the discretion of the court or judge, under the circumstances of the case, either to quash or support the writ, or to make such new rule or order, by way of qualification or exception of the prohibition first granted, as may seem fit; and where it shall appear expedient, to direct that a proper action of trespass, trespass on the case, covenant, or other form of action (according to the nature of the case) be brought, or (when found more convenient) that an issue be tried for the further investigation of the matter in dispute, and to make any order as to the costs of the motion or proceedings aforesaid as may be just or reasonable; and, when the result of any proceeding or action brought either by the direction of the court or otherwise, for determination of the matter in dispute shall appear, the party or parties against whom a prohibition shall have been obtained shall be at liberty to apply to the court for an order that it be dissolved: and

"That, instead of granting the prohibition in the first instance, the court may at its discretion grant a rule to show cause only why a writ of prohibition should not issue."

After citing these remarks, the report of 1853 proceeds as follows:—

"We concur in the principle of the above remarks (though somewhat modified by recent changes in the law) and of the suggestions founded upon them. It has been acted upon by the legislature so far as to confer the power of injunction upon the common law courts in the Patent Law Amendment Act, 1852, 15 & 16 Vict. c. 83, s. 42, and so far as to confer the power of granting prohibitions to judges at Chambers, in the County Court Amendment Act, 13 & 14 Vict. c. 61, s. 22. We, however, propose that the party injured shall be entitled to maintain an action in the ordinary form, save that in the declaration he may claim the prohibition of a wrongful act commenced or threatened, either separately or together with damages for the injury which he has actually sustained, and that the application for a prohibitory writ may be made at any stage of the cause, either before or after judgment, and granted or denied upon such terms as to keeping an account, giving security, or otherwise, as may be thought just by the court or judge."

which was founded thereon, but looking at the act of parliament alone, I think it is perfectly clear that the 82d section does not apply to ejectment.

CROWDER, J.—I am of opinion that the whole language of the 82d section, without referring to the interpretation clause, shows that it was not meant to apply to actions of ejectment: and the interpretation clause *shows that “action” is limited to *personal* actions. The [*323 reference to the report of the commissioners still further strengthens the argument: for, it is plain that the legislature did not intend to carry out the recommendation of the commissioners to its fullest extent. The rule must, therefore, be discharged.

WILLES, J.—I also am of opinion, taking all the clauses of the act which are applicable to the subject together, that the legislature did not intend to confer upon the common law courts power to grant injunctions where no action had been brought. The recommendation of the commissioners in the report of 1853 merely followed those contained in the third report of the former commissioners, made in 1831. That recommendation, if carried out, would have given power to the common law courts to issue an injunction *ex parte*, leaving the other party to move to dissolve it, or that an action or an issue should be directed to try the question. But, when the various clauses of the act of parliament are looked at, it would seem that the legislature did not think fit to invest the common law judges with that extensive power, but only to enable them to grant injunctions in certain cases after action brought, “to restrain the defendant from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right.” That at once shows that the injunction in the common law court can only be granted where an action has been brought in respect of a breach of contract,—that it is merely ancillary to an action brought complaining of an injury or breach of contract. Now, ejectment is not an action in which the plaintiff complains of a breach of contract or injury of a like kind, but is simply a proceeding to put the plaintiff in possession of the land. One *might readily conceive a case where the plaintiff might be [*324 entitled to the possession of the land, and not to the fixtures. In every point of view, therefore, I am of opinion that the clauses in question were not intended to apply to cases of this sort. The order of my Brother Coleridge will, therefore, be rescinded, but not with costs, which will be costs in the cause. Rule absolute accordingly.

SIMOND v. BRADDON. *May 8.*

A. agreed to sell to B. "a cargo of Arracan rice per Severn, now on her way to Akyah, via Australia; the cargo to consist of fair average Nieranzi rice, the price of which is to be 11s. 6d. per cwt., with a fair allowance for Larong or any other inferior description of rice (if any); but the seller engages to deliver what is shipped on his account and in conformity with his invoice. The buyer to have the option, agreeably with the terms of the charter-party, of discharging the rice at any good and safe port in the United Kingdom, or on the continent between Havre and Hamburg, both inclusive. This contract to be void provided the above vessel makes the intermediate voyage between Akyah and Calcutta agreeably with the conditions of the charter-party. Payment to be made in cash on the arrival of the vessel at port of call, in full, less freight, at invoice net weights, &c., on handing the buyer bills of lading and charter-party, with the policies of insurance, endorsed to buyer, for full value, which are to be effected in London, with particular average in the usual way, free under 3 per cent. Should the vessel be lost, this contract to be null and void:"—Held, a warranty on the part of A. to deliver a cargo consisting of "fair average Nieranzi rice," provided neither of the events occurred in which the contract was to be void.

THIS was an action for a breach of warranty on a sale of a cargo of rice.

The first count of the declaration stated that the plaintiff bought from the defendant, and the defendant sold to the plaintiff, a cargo of Arracan rice by the ship Severn, then on her way to Akyah, via Australia, upon certain terms then agreed on between the plaintiff and the defendant; that is to say, that the said cargo was to consist of fair average Nieranzi rice, the price of which was to be 11s. 6d. per cwt., with a fair allowance for Larong or any other inferior description of rice (if any); but the defendant engaged to deliver what was shipped on his account and in conformity with his invoice. The *plaintiff to
 *825] have the option, agreeably with the terms of the charter-party, of discharging the rice at any good and safe port in the United Kingdom, or on the continent between Havre and Hamburg, both inclusive. The contract was to be void, provided the said vessel should make the intermediate voyage between Akyah and Calcutta agreeably with the conditions of the charter-party. Payment to be made in cash on arrival of the vessel at the port of call, in full, less freight, at invoice net weight, taken at eighty-six baskets to the ton (English), allowing four per cent. to cover loss in weight on the voyage, on handing the plaintiff bill of lading and charter-party, with the policies of insurance, endorsed to the plaintiff, for full value, which were to be effected in London, with particular average in the usual way, free under three per cent. Should the vessel be lost, the said contract to be null and void: Averment that the said vessel did not make the aforesaid intermediate voyage, and was not lost, but afterwards arrived at her port of call, to wit, at Falmouth, and thence sailed and proceeded to her port of delivery, to wit, to Amsterdam, and there delivered her said cargo of rice according to the directions of the plaintiff; and the plaintiff paid defendant for the said rice at the rate of 11s. 6d. per cwt., less freight, at the invoice net weights, with the allowance of 4 per cent. as afore-

said: That all things had happened and had by the plaintiff been observed and performed which were necessary to entitle him to have the aforesaid terms observed and performed in all respects by the defendant, yet that the said terms were not observed or performed by the defendant, in this, that, although the said cargo consisted of Nicranzi rice, yet the said rice was not fair average Nicranzi rice, whereby not only was the said rice of less value to the plaintiff, but also by means of the premises the plaintiff had lost the profits which he would have made by a re-sale of the said cargo of rice to *Messrs. E. Bekh & Co., to whom he, the plaintiff, relying on the observance of the aforesaid terms by the defendant, re-sold the said cargo of rice on the said terms on which the plaintiff had purchased the same from the defendant as aforesaid; and the plaintiff had also incurred great expense in and about ascertaining the quality of the said rice, and in and about the warehousing thereof. [*326]

The declaration also contained counts for money received by the defendant to the use of the plaintiff, and for money found to be due from the defendant to the plaintiff on accounts stated between them: and the plaintiff claimed 1500*l*.

The defendant pleaded to the first count,—first, that he did not promise or agree as alleged,—secondly, that the said Nicranzi rice was fair average Nicranzi rice; and, to the residue of the declaration, never indebted. Issue thereon.

The cause was tried before Cockburn, C. J., at the sittings in London after last Michaelmas Term. The facts which appeared in evidence were as follows:—The plaintiff was the surviving partner in the firm of Cuylits, Simond & Co., merchants, in London, and the defendant also a merchant in London, carrying on a considerable trade as an importer of rice.

On the 10th of October, 1854, the plaintiff's house, through one Meugens, their broker, agreed with the defendant through his brokers, Messrs. Macnaughtan & Parry, for the purchase of a cargo of rice intended to be shipped at Akyab by a vessel called the Severn, which vessel the defendant had chartered, and which was then on her way out to Akyab, viâ Australia. The terms having been arranged verbally, the defendant's brokers prepared bought and sold notes in the usual way, delivering to the plaintiff's broker a copy of the former, which was in the following terms:—

*“London, October 10th, 1854.

“Bought for account of Messrs. Cuylits & Simonds, per J. P. Meugens, of our principal, W. C. Braddon, Esq., this day, the following cargo of Arracan rice per Severn, Captain Prynne, now on her way to Akyab, viâ Australia. The cargo to consist of fair average Nicranzi rice, the price of which is to be 11*l*. 6*d*. per cwt., with a fair allowance for Larong, or any other inferior description of rice (if any); but the [*327]

seller engages to deliver^(a) what is shipped on his account and in conformity with his invoice. The buyers to have the option, agreeably with the terms of the charter-party, of discharging the rice at any good and safe port in the United Kingdom or on the continent between Havre and Hamburg, both inclusive. This contract to be void, provided the above vessel makes the intermediate voyage between Akyab and Calcutta, agreeably with the conditions of the charter-party. Payment to be made in cash, on arrival of the vessel at port of call, in full, less freight, at invoice net weight, taken at 86 baskets to the ton (English), allowing 4 per cent. to cover loss in weight on the voyage, on handing the buyers bills of lading and charter-party, with the policies of insurance endorsed to buyers, for full value, which are to be effected in London, with particular average, in the usual way, free under 3 per cent.

"Should the vessel be lost, this contract to be null and void."

"Brokerage, $\frac{1}{2}$ per cent.

(Signed) "MACNAUGHTAN & PARRY."

The Severn arrived at Akyab in January, 1855, and the defendant's correspondents there shipped for him 6000 bags described in the invoice as "old Nicranzi *rice." On her arrival at Falmouth, in June *328] 1855, Messrs. Macnaughtan & Parry delivered to the plaintiff an invoice, describing the cargo as 6000 bags old Nicranzi rice of the net weight of 434 tons, 8 cwt. 0 qrs. 25lbs. at 11s. 6d. . . 4995 14 6
Less freight 4l. 5s. per ton. . . . 1846 5 0
Two months' discount at 5 per cent. . . 15 7 8 1830 17 4

3164 17 2

Brokerage, $\frac{1}{2}$ per cent. . . 24 19 7

£3189 16 9

The plaintiff immediately handed over to Messrs. Macnaughtan & Parry a check for the amount of this invoice, in exchange for the bill of lading, policies of insurance, and the original invoice sent to the defendant by his correspondents at Calcutta.

The Severn having been sent to Amsterdam, it was found, when the cargo was unloaded, that the rice was considerably below the fair average of Nicranzi rice, an unusual quantity of "paddy," or rice in the husk, being mixed with it, though it did not appear that it contained any Larong or other inferior description of rice. Immediately on discovering that the rice did not answer the description in the contract, the plaintiff gave the defendant notice of that fact, and that he should hold him responsible for the difference

On the part of the plaintiff, it was contended that the defendant bound himself by his contract to deliver a cargo which should consist

(a) In the sold note the word "only" was introduced here after the contract was signed.

of "fair average Nicranzi rice," and therefore that he was entitled to recover the difference between the price paid under the contract and the value of the rice actually delivered.

*For the defendant, on the other hand, it was insisted that the only warranty contained in the contract, was, to deliver what [329] should be shipped on his account and in conformity with his invoice; and that the stipulation that the cargo should consist of fair average Nicranzi rice was a condition, and not a warranty.

In answer to a question put to them by his Lordship, the jury said that the rice delivered was not fair average Nicranzi rice; and a verdict was thereupon taken for the plaintiff,—the amount of damages to be referred,—and leave being reserved to the defendant to move to enter the verdict for him, if the court should be of opinion that the contract did not contain the warranty contended for; and it was agreed that the declaration should, if necessary, be amended by alleging, that, although the said cargo consisted of Nicranzi rice, yet it was not fair average Nicranzi rice, and the defendant did not make a fair allowance for its inferior quality, but neglected and refused so to do.

Montague Smith, in Hilary Term last, obtained a rule calling upon the plaintiff to show cause why the verdict should not be entered for the defendant on the first issue, or why the judgment should not be arrested, on the ground,—first, that there was no warranty that the cargo to be shipped should be fair average Nicranzi rice,—secondly, that the contract alleged did not support the breach.

Byles, Serjt., and *Unthank*, showed cause.—That which the plaintiff complains of, is, that the defendant has failed in the performance of his contract in two respects, inasmuch as he has not delivered rice of the quality contracted for, nor the quantity he engaged to deliver. The cargo was to consist of "fair average Nicranzi rice," the price of which was to be 11s. 6d. per *cwt. The contract then goes on to [380] provide what shall be done if any of the rice should turn out to be of an inferior description,—not an inferior quality of Nicranzi rice. The declaration is drawn upon the hypothesis that "description" here means "sort." A fair allowance is to be made for Larong or any other inferior description of rice, if any. Larong is a description of Arracan rice very inferior in quality to Nicranzi; so also is Latouri. If the cargo should contain a mixture of these, an allowance was to be made. If, however, "description" is to be read "quality," then the plaintiff would be entitled to recover in respect of the inferiority of quality; and the declaration may be amended, as arranged at the trial. The vessel having arrived at Falmouth, and the plaintiff having paid for the cargo without having had an opportunity of inspecting it, he is clearly entitled to recover under the special count the fair allowance stipulated for, as well as the sum paid in excess for the deficient quantity. The breach assigned in the first count, is, that, although

the cargo consisted of Nicranzi rice, yet the said rice was not "fair average Nicranzi rice." The first question, therefore, will be, whether the contract contains a warranty that the cargo shall consist of rice of that description. If the words of the contract had been, "the cargo to consist of fair average Nicranzi rice," without more, it would unquestionably have amounted to a warranty: *Hutchinson v. Booker*, 5 M. & W. 585;† *Allan v. Lake*, 18 Q. B. 560 (E. C. L. R. vol. 83). In this latter case, the defendant, by his agent, sold the plaintiffs a parcel of turnip-seed, and gave the following sold note: "Mr. T. C. R. (the defendant's agent) sold to Messrs. B. & Co. (the plaintiffs), for Mr. C. L. (the defendant), 14 qrs. Skirving's Swedes, at 17s. per bushel:" and it was held that the jury were properly directed that the description of the seed in the sold note amounted to a warranty that it was Skirving's Swedes. Upon a motion for a new trial, Erle, *831] *J., said: "The statement that the seeds were Skirving's Swedes, was, in one sense, mere matter of description: but it was a description of a known article of commerce; and the defendant was not at liberty to substitute another sort of turnip-seed which did not answer that description. He could not vary from that contract as regarded the seeds being Skirving's, any more than he could with regard to their being Swedes." [COCKBURN, C. J.—Either the stipulation as to allowance for inferior descriptions of rice includes Nicranzi, or upon the finding of the jury the defendant has failed to perform his contract.] The plain and obvious construction of the contract is, that the buyer is to have fair average Nicranzi rice, or an allowance for rice of inferior description. Assuming that "description" is to be taken as synonymous with "quality," the declaration may be amended, as suggested at the trial. The clause which will be relied on by the other side,—“but the seller engages to deliver what is shipped on his account, and in conformity with his invoice,”—was evidently put in to meet such a controversy as that which took place in *Vernede v. Weber*, 1 Hurlst. & Norm. 311,†—to prevent either party taking advantage of a rise or fall in the market. In that case, the plaintiff and defendant, by their agent, contracted as follows:—"Sold for W. to V. the cargo of 400 tons (provided the same be shipped for seller's account), more or less, Arracan Nicranzi rice, of the average quality of the crop as shipped to Europe, per British vessel Minna, sailed last September from Antwerp in ballast, direct to Akyab, to proceed from thence to a port in the Channel for orders at 11s. 6d. per cwt. for Nicranzi, or at 11s. for Larong; the latter quantity not to exceed 50 tons, or else at the option of buyers to reject any excess: to be taken at invoice weight, &c., and to be paid for by cash on arrival of the vessel at the port of call, on delivery of the bills of lading, charter-party, and policy of insurance: *832] *insurance effected in London or Holland, upon usual London terms (with particular average), to the full amount of invoice.

The vessel loaded 285 tons of Larong, and 150 tons of Latouri: and it was held,—first, that the contract did not contain a warranty that the rice should consist of Arracan *Nicranzi* rice, but that the contract was conditional upon a cargo of Arracan *Nicranzi* rice being shipped on the seller's account,—secondly, that the buyers were not entitled to the delivery either of the whole cargo or of the Larong, because the contract was for an entire cargo which would substantially satisfy the description of Arracan *Nicranzi* rice. At all events, the plaintiff is, upon the authority of *Devaux v. Conolly*, 8 C. B. 640 (E. C. L. R. vol. 65), entitled to recover as money had and received the excess paid in respect of the "paddy," which the evidence showed to have been more than double the usual proportion found in these cargoes.

M. Smith, Q. C., and *Tomlinson*, in support of the rule.—This contract, it is submitted, contains no warranty as suggested. In the older cases, it was doubted whether any words of description could amount to a warranty. In *Chandelor v. Lopus*, Cro. Jac. 2,—the notes to which in 1 *Smith's Leading Cases* (4th edit.), 140, give the history of the law upon this subject,—the inclination of the court was that it did not. By the course of modern decisions, however, it seems, that, in the case of the sale of an existing chattel by a particular description, the vendor warrants that it is of the kind described. That is exactly the case of *Allan v. Lake*, 18 Q. B. 560 (E. C. L. R. vol. 88). Contracts for chattels to be manufactured for a particular purpose belong to a totally different class. Where the article is to be made or procured, it is open to conjecture whether it will or will not answer the purpose intended. Here, the contract is for an article of commerce of very recent introduction, and subject to much fluctuation of price and *quality. [*338 The true construction of the contract is, that the seller shall deliver only what was shipped, and in conformity with his invoice; and, if what was shipped was Arracan *Nicranzi* rice, it was to consist of fair average quality, and be at a given price. It was manifestly uncertain when the ship would arrive at Akyab, or what sort of cargo she would bring. If she arrived there before the season for the new rice to come down to the port of shipment, she must necessarily take on board old, which of course would be below the average quality. All that the defendant binds himself to do, is, to deliver the cargo that is shipped for him; and no engagement can be inferred other than that express engagement. In *Budd v. Fairmaner*, 8 Bingh. 48, 1 M. & Scott, 74 (E. C. L. R. vol. 28), in an action for a breach of warranty on the sale of a horse, the purchaser produced the following receipt, signed by the seller,—“Received of A. B. (the purchaser) 10*l.* for a gray four-year-old colt, warranted sound in every respect:” and it was held, that, in the absence of fraud, the warranty was restricted to the soundness of the animal, the age being mere matter of representation or description. So, here, there being an express warranty to deliver what was shipped

on the seller's account, and in conformity with his invoice, a warranty that the rice shipped should be of a particular quality cannot also be inferred. [COCKBURN, C. J.—Suppose a cargo of Larong came, could the buyer exercise the option of taking it, subject to an allowance?] The seller would be bound to offer it, but the buyer might reject it; the latter being only *bound* to accept the cargo, if fair average Nicranzi rice came. This is substantially the same contract as that in *Vernede v. Weber*. In delivering judgment there, Alderson, B., says: "There can be no doubt that the contract contemplates a cargo consisting principally of Arracan Nicranzi rice, and that Larong rice was to form but *834] a subsidiary part. The contract is described *as one contract for an entire cargo, one bill of lading, one charter-party, and one policy of insurance: and we think it would have been impossible for the defendant to have insisted upon the plaintiff's accepting a cargo consisting only of a minute portion of Arracan Nicranzi rice; for, unless the cargo was what would substantially satisfy the description of a cargo of Arracan Nicranzi rice, we think that the plaintiffs could not have been forced to accept it. It is true that the contract included Larong rice also, if the cargo included it. But it is obvious that this was so much considered subsidiary to the other, that the cargo is described merely as one of Arracan Nicranzi rice, and the buyer was not obliged to accept more than 50 tons of Larong rice included in a cargo so described; and, if the plaintiff would not have been bound to accept the cargo brought, the defendant was not obliged to deliver it, for, the contract must be mutual and reciprocal." Here, if a small proportion of Larong or other inferior description of rice should come, a fair allowance is to be made: but, if the rice brought home is Nicranzi rice, though not of fair average quality, the clause as to allowance does not apply, though the buyer might be entitled to reject it. *Johnson v. Macdonald*, 9 M. & W. 600,† is also an authority to show that there is no warranty here. And *Devaux v. Conolly*, 8 C. B. 640 (E. C. L. R. vol. 65), has no application. The deficiency of weight arising from the excessive quantity of paddy, affects only the quality of the cargo. No decided case at all approaches this. It is, therefore, open to the court to look at all the surrounding circumstances, to ascertain what the parties really meant by the contract they have entered into.

COCKBURN, C. J.—I am of opinion that this rule should be discharged. The language of the contract certainly is not altogether free *835] from ambiguity or doubt: *but, looking at all its terms, it appears to be a contract whereby the seller engages, that, unless the *Severn*, then on her way to Akyab, should be sent thence to Calcutta, agreeably with the terms of the charter-party, or should be lost, she should ship a cargo of rice, and bring it home for the benefit of the buyer; and, further, the seller warrants that the cargo so shipped shall consist of "fair average Nicranzi rice." Some difficulty was intro-

duced into the case, and some discussion arose as to the effect of that part of the contract which provides that the price is to be 11s. 6d. per cwt., "with a fair allowance for Larong or any other inferior description of rice (if any)," followed immediately by this stipulation,—“but the seller engages to deliver what is shipped on his account, and in conformity with his invoice.” Looking at the extrinsic evidence, one can entertain but little doubt that the intention of the parties was, that the seller engaged to deliver only what was actually shipped on his account. But that does not appear upon the face of the contract, the word “only” not having been inserted until after the execution of it. We must construe the contract as we find it,—that word being excluded. Having so to construe the contract, I do not think, looking at that which follows the words “fair average Nicranzi rice,” there is anything to be found which ought to have the effect of detracting from the warranty which arises from the former part of the instrument. And, although it was held in *Vernede v. Weber*, 1 Hurlst. & Norm. 311,† that the seller was not bound to deliver the cargo where it did not substantially consist of Nicranzi rice, we may gather from that case that it is not unusual for these cargoes to be made up of a portion of rice of an inferior description, and called Latouri and Larong; and that it is fair to suppose, that, though the buyer intended that the seller should warrant the cargo to be fair average Nicranzi rice, nevertheless he meant to secure to himself the right to claim the delivery of it, [*336 though a portion should consist of Latouri or Larong or other inferior rice, and so should not satisfy the contract, and to take care to protect himself by stipulating for a fair allowance for rice of an inferior quality, if any such there were. Looking, then, at the whole contract, and at the probable intention of the parties, it seems to me that the fair construction is, that it amounts to a warranty on the part of the seller that the cargo should consist of fair average Nicranzi rice, with a stipulation, introduced for the benefit of the buyer, that he may if he chooses take the cargo such as it is, and claim a deduction in price for the inferior quality. No question arises here as to Latouri or Larong, none having in fact come. But, the jury having found that the cargo shipped did not consist of “fair average Nicranzi rice,” I am of opinion, that, without resorting to any amendment, the plaintiff is entitled to recover upon the declaration as it stands.

CRESSWELL, J.—I am of the same opinion. It seems to me that this contract amounts to an undertaking that the vendor shall at Akyab ship a cargo of rice and bring it home for the purchaser, unless the ship should be lost or should be sent upon the contemplated intermediate voyage from Akyab to Calcutta,—in either of which cases the contract was to be void. It being, then, an undertaking that this cargo should be shipped, the vendor undertakes further that it shall consist of fair average Nicranzi rice, the price of which is to be 11s. 6d. per cwt.

The question is, whether that amounts to a warranty. I do not know why it should not. The seller undertakes to ship a cargo, and that it shall be of a specific description. I see no reason why that should not be held a warranty. This construction receives confirmation from the stipulation which follows,—“with a fair allowance for Larong or any *387] other inferior description of rice, if any.” The *cargo might be fair average Nicranzi rice, though it should contain a small admixture of rice of an inferior quality or of an inferior description or denomination. It is somewhat remarkable, that, though the parties have provided that an allowance shall be made if the cargo should contain any Larong or other inferior description, though it should not be sufficient to prevent the cargo from being fair average Nicranzi rice, there is no such provision as to Nicranzi rice, but that rests on quality. The buyer would not be entitled to claim any allowance if any part of the cargo should consist of Nicranzi rice of inferior *quality* provided the whole answered the description of “fair average Nicranzi rice,” though he would be if any part consisted of Larong or any other inferior *description* of rice. The latter words throw no light upon that part of the contract. Why they were introduced, I do not stop to inquire. We must take the contract as we find it. Those words may have been introduced because the parties may have supposed that the contract could not be fulfilled by the delivery of a cargo consisting of any portion of Larong or other inferior description of rice. But, whatever they may have intended, the words thus introduced cannot affect the construction of the other part of the contract, which is perfectly plain and simple,—“I undertake to bring you a cargo which shall be fair average Nicranzi rice, and the price shall be 11s. 6d. per cwt.”

CROWDER, J.—I also think that this is a contract for a cargo of fair average Nicranzi rice. That plainly is the substance of the contract. If the cargo had been on board the ship at the time the contract was entered into, there could have been no doubt. But here the ship was to go and get a cargo of the description mentioned, viz. fair average Nicranzi rice. Such being the contract, there is a stipulation that it *388] shall be void in *certain events,—if the ship should be lost, or if she should make the intermediate voyage contemplated by the charter-party from Akyab to Calcutta. The contract, therefore, was to enure as a contract to bring home a cargo of fair average Nicranzi rice, unless one of those events should take place. The price also is fixed. Then comes the clause which has given rise to the only doubt that could arise upon the construction of this contract,—“with a fair allowance for Larong or any other inferior description of rice, if any.” It seems to me that the introduction of that clause is explainable by the fact that a cargo might arrive which might contain a portion of rice of the descriptions called Larong or Latouri, and yet answer the description of “fair average Nicranzi rice.” It would seem but reasonable

that in that case a fair allowance should be made in respect of the inferior description of rice. Then comes the stipulation that "the seller engages to deliver what is shipped on his account, and in conformity with his invoice." It is contended on the part of the defendant that that is *all* he engages to do. There may, however, have been a good reason for introducing that clause, inasmuch as a rise in the market might make it profitable to the seller to withhold the cargo, and therefore the buyer may have been desirous of having the option to take it, though of inferior quality. Upon any other construction of the contract, a difficulty would arise upon the clause providing for the time and mode of payment, which is "to be made in cash on arrival of the vessel at port of call, in full, less freight at invoice net weight, &c., on handing the buyers bills of lading and charter-party, with the policies of insurance, endorsed to buyers for full value." It is difficult to suppose that the parties contemplated that the cargo should be paid for without the buyer's having an opportunity to inspect it, and that his only remedy, in the event of the cargo turning out to be of less than fair average quality, was to be by an action to recover back his money. For these reasons, I agree with my Lord and my Brother Cresswell in the construction which they have put upon the contract. [*339]

WILLES, J.—I am entirely of the same opinion. This is a bargain for the purchase by the plaintiff from the defendant of a cargo of Arracan rice, to be shipped by the latter on board a vessel chartered by him, and to consist of "fair average Nicranzi rice," at a given price per cwt. There is a stipulation for an allowance to be made for Larong or any other inferior description of rice: but, as the ship did not bring any Larong or other inferior description of rice, there is no necessity to refer to that stipulation or to those relating to the delivery or payment, except in so far as they may affect the construction of the previous part of the contract describing the rice to be delivered. Those provisions are evidently introduced for the benefit of the buyer, who may insist upon having the cargo delivered to him, though its inferiority of quality might entitle him to some allowance. Thus the parties are thrown back upon the first part of the contract, viz. that the cargo is to consist of fair average Nicranzi rice. Then there is a stipulation that the contract is to be void if the ship is sent from Akyab to Calcutta, or if she should be lost. One would naturally infer from those stipulations, that the contract was to remain in force if neither of these events should happen. The cargo to be obtained by the buyer is to consist of rice of a given quality. The circumstance of the price being fixed at the time it was, would lead one to expect that the parties were dealing with a thing the value of which could be ascertained by reference to its quality. That is given: it is to be "fair average Nicranzi rice." The buyer is not to pay 11s. 6d. per cwt. for rice of *any* qua-

*840] lity: he therefore stipulates *for rice of a certain description, and of fair average quality. That clearly amounts to a warranty. Rule discharged.

GARDNER v. GROUT. *May 5.*

Where goods are sold by sample, the handing over the samples to the buyer does not, in the absence of evidence of an usage or custom to the contrary, amount to a delivery and acceptance of a part of the thing sold, so as to take the case out of the 17th section of the Statute of Frauds: but it is otherwise where the buyer draws samples from the bulk after he has purchased the goods.

THIS was an action for the breach of a contract to deliver $24\frac{1}{2}$ tons of sacks and bags, which the defendant had agreed to sell to the plaintiff at the price of 11*l.* per ton.

At the trial before Williams, J., at the first sitting in London in the present term, a contract by word of mouth was proved in the terms alleged in the declaration; but there was no contract in writing, nor any part payment. The plaintiff, however, relied, for the purpose of taking the case out of the Statute of Frauds, upon a part delivery and acceptance, as to which the evidence was as follows:—Four days after the sale, the plaintiff went to the defendant's warehouse, and asked for samples of the sacks and bags, which were given to him by the defendant's foreman, and which he promised to pay for when the bulk (which was all there at the time) was taken away. The samples so given to the plaintiff were by the defendant's order weighed and entered.

On the part of the defendant, it was submitted that the taking the samples was not such a part acceptance of the thing sold as would satisfy the 17th section of the statute.

For the plaintiff, the case of *Hinde v. Whitehouse*, 7 East, 558, was relied upon. There, sugars, which were in the King's warehouse, under the locks of the King and the owner, from whence they could not be *841] removed *till the duties were paid, were advertised for sale by auction on the 20th of September, when samples of $\frac{3}{4}$ lb. weight from each hogshead, drawn after the sugars had been weighed and the duties ascertained at the King's beam, were produced to the bidders assembled; and the auctioneer,—having then before him the printed catalogue of sale, containing the lots, marks, and number of hogsheads, and the gross weight of the sugars, and also another written paper containing the conditions of sale, which latter he read to the bidders as the conditions on which the sugars mentioned in the catalogue were to be sold, but the two papers were not externally annexed, nor did they contain any internal reference to each other,—wrote down on the catalogue the name of the highest bidder, and the sum bid for the particular lots; having first informed the bidders that the duties had not then

been paid, but would be paid on the morrow by the seller : and, *after the biddings closed, the samples were delivered to and accepted by the purchaser, according to the usual practice at such sales, as part of his purchase, to make up the quantity marked as weighed at the King's beam* : and a fire having consumed the sugars on the 22d of September, before the duties could be paid, and without the default of the seller,—it was held, first, that, at common law, there was a sale to change the property at the time and place of auction, though the goods could not be delivered till the duties were paid, which was known at the time ; such being the manifest intent of the contracting parties ; and, consequently, that the loss must fall upon the buyer,—secondly, that, assuming a sale of goods by auction to be within the 17th section of the Statute of Frauds, 29 Car. 2, c. 3,(a) and therefore requiring to be *evidenced by a memorandum in writing of the bargain, signed [*342 by the party to be charged, or his authorized agent, except where the buyer shall receive part of the goods sold : yet here the delivery to and acceptance of the samples by the buyer, *which delivery was made as part of the thing purchased*, and upon which the duties were paid, at any rate took the case out of the statute.

The learned judge left it to the jury to say whether the samples of the sacks and bags were delivered and accepted as part of the bulk. The jury found that they were, and accordingly a verdict was taken for the plaintiff (damages 40*l.*), leave being reserved to the defendant to move to enter the verdict the other way, or a nonsuit, if the court should be of opinion that there was no acceptance of part, to take the case out of the statute.

Hawkins now moved accordingly.—The acceptance of the samples clearly was not an acceptance of part of the things sold, so as to take the case out of the 17th section of the Statute of Frauds. In *Hinde v. Whitehouse*, the samples were, according to the practice of the particular sales, to be taken by the buyer as part of the bulk : there was, however, no such evidence here. [CRESSWELL, J.—The whole of the bulk was there?] Yes. [CRESSWELL, J.—Suppose the parties here were reversed, could the buyer have insisted that he had not accepted a part of that which he had purchased?] It is submitted that he might. [COCKBURN, C. J.—Generally speaking, the sample is shown separately, as a specimen of that which the seller is offering to dispose of. But here, the buyer takes it as a part of something which he has already bought.] This question arose in a case of *Simonds v. Fisher*, at the sittings in the Queen's Bench after last term. There, the plaintiff showed the defendant samples of wine, which the latter agreed to buy ; and, after the bargain was concluded, the buyer asked to have the

(a) See *Emmerson v. Heelis*, 2 Taunt. 38, *White v. Proctor*, 4 Taunt. 209, and *Bird v. Boulter*, 4 B. & Ad. 443 (E. C. L. R. vol. 24).

*343] samples handed over *to him, and wrote on the labels the prices agreed upon. An action having been brought against him for not accepting the wine, the taking the samples was relied on by the plaintiff as a part acceptance, so as to take the case out of the statute. But Wightman, J., before whom the cause was tried, directed a non-suit, reserving the plaintiff leave to move. A motion was accordingly made on the 27th ult., and a rule nisi granted, which is now pending. (a)

COCKBURN, C. J.—That is a very different case from the present. There, the buyer never saw the bulk: the things handed to him really were mere samples. But here the plaintiff receives part of the very things which he has already bought. I think there should be no rule.

The rest of the court concurring,

Rule refused.

(a) The rule never came on for argument, it having been discharged under the authority of a judge's order on the 29th of July, 1857.

*344] *THE GREAT NORTHERN RAILWAY COMPANY v.
WYLES and Another. April 25.

The defendants hired sacks from the plaintiffs for the conveyance of grain on their railway, subject to certain regulations, amongst which were the following:—"2. The charges for the use of sacks will be $\frac{1}{4}$ d. per sack per journey when discharged at any of the company's stations on the company's line, or at their warehouses, or at warehouses or mills connected by rail with the company's line; and 1d. per sack when sent to foreign stations: 3. Demurrage of $\frac{1}{4}$ d. per sack per week will be charged after the expiration of fourteen days; the hire to commence from the time the sacks leave the station to be filled; the time allowed for filling and returning to the station to be seven days: 10. None of the company's sacks containing grain will be allowed to leave any station (local or foreign), unless a guarantee is first obtained by the clerk in charge, from the consignee, that the grain will be immediately discharged, and the sacks returned the same day, and to the same station:—Held, that the company's claim for demurrage arose at the expiration of fourteen days from the hire of the sacks; and that the only person with whom there was any contract for demurrage was the *consignor*, by virtue of the 3d regulation; but that, by the operation of the 10th regulation, his liability ceased upon the company's permitting the sacks to get into the hands of the *consignee*, whether with or without a guarantee.

THIS was an action brought by the Great Northern Railway Company for money payable by the defendants to the plaintiffs for the demurrage of sacks of the plaintiffs kept on demurrage by the defendants, and for the hire of sacks by the plaintiffs let to hire by the defendants, and for money found to be due from the defendants to the plaintiffs on accounts stated between them: and the plaintiffs claimed 50*l*.

As to 1*l*. 15*s*. 6*d*., parcel of the plaintiffs' claim, the defendants brought that sum into court, and said that it was enough to satisfy the claim of the plaintiffs in respect of the matter therein pleaded to,—secondly, they pleaded never indebted as to the residue of the declaration,—thirdly, to the same residue, payment before action.

The plaintiffs took out the 1*l*. 15*s*. 6*d*., and joined issue as to the rest.

The cause was tried before Cresswell, J., at the sittings at Westminster after last Michaelmas Term. It appeared that the plaintiffs sought to recover 20*l.* 11*s.* 5*d.* for demurrage of sacks let by them to the defendants. The particulars of demand especially endorsed on the writ were as follows:—

*[345]	*"1854. To sack demurrage, as per account delivered	£	s.	d.
	"1855. To do. do.	8	1	5.
	"1854. To sack demurrage, as per account rendered	1	15	6.
	"1854. To do. do.	2	6	8.
	"1854. To do. do.	3	18	3.
	"1854. To do. do.	3	4	9.
	"1855. To do. do.	0	17	6.
	"1855. To do. do.	0	7	9.

£20 11 5"

The defendants are corn-merchants carrying on business at Grantham and at Nottingham. They are in the habit of buying and selling corn and grain of and to farmers and merchants in numerous districts, on the Great Northern, Midland, Ambergate, North Stafford, and other railways, a great portion of which is consigned by and to the defendants in sacks belonging to the Great Northern Railway Company, to which the regulations hereinafter mentioned apply. Where corn or grain so consigned travels on the plaintiffs' and other lines of railway, one line only receives the rates or tolls for the entire journey, and the division of the tolls between themselves is arranged (quite apart from consignors or consignees) at the railway clearing house. The hire of the sacks, however, is always charged by the company from whom they are taken up, though the freight of the consignment may be charged by another. The sacks are furnished, not by the company, but by a person named Lee, with whom they contract for this purpose. The general sack-depôt of the plaintiffs or their contractor being at Boston, the course prescribed by the regulations is this:—From that dépôt, each station requiring sacks shall obtain them; and to that dépôt they shall be returned, not from the consigning or forwarding station, *but [346 from the receiving station. The merchant or farmer requiring sacks wherein to forward his corn, is to apply for them at the forwarding station; and the forwarding station is to apply to the dépôt. The forwarding station having received them, hands them over to the merchant, who fills them and returns them to the same station, with a forwarding note directing where they are to go. The forwarding station then advises the dépôt of the particulars of the sacks, consignors, consignees, places of consignment, &c. The regulations above referred to were as follows:—

"Great Northern Railway Company.

"General Sack Regulations. Mr. Lee, contractor.

"1. Application for sacks to be made to the clerk in charge of the station where the sacks will be put on the rail when filled, who will forward them to the sack contractor's office, Boston.

"2. The charges for the use of sacks will continue as formerly, viz. $\frac{1}{2}d.$ per sack per journey when discharged at any of the company's stations on the company's line, or at their warehouses, or at warehouses or mills connected by rail with the company's line; and $1d.$ per sack when sent to foreign stations. The district where the $\frac{1}{2}d.$ charge is in force comprises all places north of Doncaster.

"3. *Demurrage of $\frac{1}{2}d.$ per sack per week will be charged after the expiration of fourteen days; the hire to commence from the time the sacks leave the station to be filled; and that the time to be allowed for filling and returning to the station be seven days.*

"4. None of the company's sacks must be allowed to leave the station for the purpose of being filled, unless a deposit equal to the value is left with the clerk in charge, or the signature of well known and respectable parties obtained for their immediate and safe return according to the third regulation.

*347] "5. The first hiring to be pre-paid; and, when the sacks leave a station for the purpose of being filled with corn to be sent by railway, they must in all cases be returned to the stations from which they are delivered to the sender for that purpose, in accordance with rule 1.

"Parts of a week to be charged as a week.

"7. In all cases, foreign stations are required to return Great Northern sacks directly; and they must be addressed to the sack depôt at Boston, and not to the station from which sent.

"8. No Great Northern sacks must be reconsigned from a foreign station to any other station, but immediately returned to the sack depôt at Boston, according to rule 7.

"9. It is arranged, that, in all cases, sacks will be supplied direct from the depôt at Boston; and it is therefore required that sacks, if received at any of the stations, be sent to Boston, and not re-issued, unless by special order or permission obtained from the contractor's office, Boston.

"10. *None of the company's sacks containing grain will be allowed to leave any station (local or foreign), unless a guarantee is first obtained by the clerk in charge, from the consignee, that the grain will be immediately discharged, and the sacks returned the same day, and to the same station.*

"If under any circumstances, this rule is disregarded, the clerk in charge is required to make a special report to the sack contractor at Boston, who reserves to himself the right of refusing any party the same privilege on a second application.

"11. The contractor engages to supply stations applying for sacks not later than thirty-six hours after the application is received.

"12. A complete debtor and creditor account must be kept at every station where sacks are supplied to the *public, and when they [348 are received with grain in them. This account must show how and when all sacks are received, and how disposed of, so that the state of the stock can be at all times ascertained by reference thereto.

(Signed.) "SEYMOUR CLARKE.

"General Manager's Office, King's Cross, 1853."

It was admitted that the defendants knew of these regulations: and it was proved that the company had never been in the habit of enforcing the 10th article of the regulations, by requiring a guarantee.

Similar regulations were issued by the company in 1854: and, on the 1st of January, 1854, the several companies interested (the Great Northern included) made a general regulation which contained, amongst others, the following provisions:—

"5. The time allowed for filling and returning the sack by *senders* to the forwarding station with a forward consignment note is four days, after which demurrage at $\frac{1}{4}d.$ per sack per week will be charged to *sender*.

"6. The time allowed to *consignees* is fourteen days from date of invoice from the forwarding station; and, if he is allowed to remove the sacks from the receiving station, he must return them to the same station within the time stated above, or demurrage at $\frac{1}{4}d.$ per sack per week will be charged to *consignee*."

On the part of the plaintiffs, it was objected that these latter regulations were not admissible.

The second item in the particulars, for 1*l.* 15*s.* 6*d.*, in respect of which the defendants had paid that sum into court, was claimed as demurrage of sacks where the defendants were themselves both consignors and consignees.

A number of accounts were put in, in which demurrage was claimed by the plaintiffs in cases where the sacks had been obtained by the defendants, but consigned to third persons: but there was no charge made against the defendants in any of them for demurrage, except in cases where *they were consignees: and the main contention [349 between the parties was, whether the demurrage was payable by the consignors of the corn, who obtained the sacks for the company, or by the consignees,—the plaintiffs insisting that it was payable by the consignors, the defendants that it was chargeable only to the consignees.

At the suggestion of the learned judge, a verdict was entered for the plaintiffs for 8*l.* 1*s.* 5*d.*, the amount of the first item, subject to a motion to enter the verdict for the defendants if the court should be of opinion that their construction of the regulations was the correct one,—the court to have power to draw any inference of fact as a jury, if they

should think any question of fact ought to have been left to the jury; and also whether the rules of 1855 were admissible. If the defendants were held liable, the amount of their liability to be ascertained by a reference.

Manisty, accordingly, in Hilary Term last, obtained a rule calling upon the plaintiffs to show cause why a verdict should not be entered for the defendants, on the ground that there was no evidence of any contract by the defendants to pay the demurrage in question, or upon the ground that the weight of evidence was in favour of the defendants, and showed that the consignees and not the consignors of the sacks were the parties liable to pay the demurrage sought to be recovered.

Pigott, Serjt., and *H. James*, in the course of the same term, showed cause.—There was abundant evidence of a contract on the part of the defendants with the company to pay the demurrage in question. It was admitted that the defendants knew of the regulations, and that the sacks were originally hired by them, and filled with grain forwarded by them along the plaintiffs' line, and thence on to foreign lines. By the *350] 2d article of *the regulations of 1853, the hirer is to be charged $\frac{1}{2}d.$ or $1d.$ per sack per journey, according as the sacks are sent to a station upon the company's own line or to a foreign station, or a place off their line. By the 3d article it is provided that "demurrage of $\frac{1}{2}d.$ per sack per week will be charged after the expiration of fourteen days; the hire to commence from the time the sacks leave the station to be filled; and that the time to be allowed for filling and returning to the station be seven days." Suppose the time occupied in filling and returning were three weeks,—the party hiring would have to pay the $\frac{1}{2}d.$ or $1d.$ for the hire, and $\frac{1}{2}d.$ per sack demurrage for the week which had elapsed beyond the fourteen days, and $\frac{1}{2}d.$ per week until the sacks were returned to the depôt. [CRESSWELL, J.—The regulations are a little ambiguous in that respect: it may be that they are applicable to demurrage accruing before the sacks are sent upon the journey: but, if these regulations only make the defendants responsible for demurrage accruing at the commencement of the journey, the plaintiffs made out no case entitling them to a verdict.] No question was raised at the trial as to the period at which the demurrage accrued: the only question was, whether the bailees of the sacks contracted with the company to pay demurrage. The only person the company deals with or knows, is, the person who applies to them for sacks. It cannot be supposed that the regulations were intended to apply to strangers. At the time the sacks leave the contractor's premises for the purpose of being filled, the contract must necessarily be with the consignors. When does the express contract with the consignors end, and the implied contract with the consignee commence? If the consignee were to be held liable for demurrage, see the hardship that would be entailed on him, where the sacks do not reach him until

after the expiration of the fourteen days. The 10th article of the regulations of 1853 *strongly fortifies the argument. It provides that "none of the company's sacks containing grain will [*351 be allowed to leave any station (local or foreign), unless a guarantee is first obtained by the clerk in charge, from the consignee, that the grain will be immediately discharged, and the sacks returned the same day, and to the same station." That plainly shows that no demurrage is contemplated as being incurred through delay on the consignee's part.

Manisty and Field, in support of the rule.—The question is, not simply whether the consignor or the consignee is liable for demurrage; but whether, upon the construction of the 2d, 3d, and 10th articles of the regulations of 1853, which were in force when this claim arose, these defendants ever entered into any contract, express or implied, to pay demurrage for the detention of sacks by the consignees, after they had ceased to be at the orders or under the control of the defendants. These regulations, it is to be observed, are prepared by the company rather for the guidance of their own servants than with the notion of their constituting a contract between themselves and the public, though, coupled with conduct, they may amount to a contract: and for this purpose they must be construed in conformity with the mode in which the parties have dealt with them. By the 3d article, demurrage of $\frac{1}{2}d.$ per sack per week is to be charged after the expiration of fourteen days: the hire to commence from the time the sacks leave the station to be filled; and seven days are to be allowed for filling and returning to the station. When do the fourteen days begin to run? Is it from the commencement of the hiring? That can hardly be; for, if so, what becomes of the provision allowing seven days for filling and returning? Is the consignor to be held responsible for delay, the fault of the company at either *station? Having filled and returned the [*352 sacks to the station, the consignor's duty is performed, and his liability ended. [CRESSWELL, J.—The 3d article, whatever its extent may be, is evidently directed against the *consignor*.] It is difficult to say that that is not so. [CRESSWELL, J.—That being so, what rule is there which obliges the *consignee* to pay demurrage *eo nomine*?] There is none. But the 10th article gives the company a claim for unliquidated damages against the consignee, provided it is acted upon and a guarantee taken from the consignee that the grain will be immediately discharged, and the sacks returned the same day, and to the same station. Suppose the consignors kept the sacks ten days, and then the consignee came and received the sacks, giving the guarantee provided by the 10th article, but failed to perform it,—would not the company have a clear right of action for that breach of contract, even though the fourteen days should not have expired? [CRESSWELL, J.—It may be that the consignee would be liable to an action for the breach of

contract: but, is he liable for demurrage?] Not as demurrage. [CRESSWELL, J.—Suppose when the goods arrive at their destination, the consignee declines to accept them,—who is to pay demurrage?] The consignor, no doubt. But the moment the sacks are allowed to get into the hands of the consignee, the consignor's responsibility is at an end: otherwise, what is there to prevent the company from charging him with six years' demurrage? This is the construction the plaintiffs themselves have put upon the regulations, by their mode of dealing with them. [CRESSWELL, J.—No distinction was suggested at the trial between demurrage at the beginning or the end of the journey. Your argument now is, that, where the liability of the consignee arises under the 10th article, the liability of the consignor to demurrage under the *353] 3d is discharged.] Precisely so. If the demurrage arises *before the sacks reach the hands of the consignee, the consignor is liable. The subsequent regulations of 1855 show the construction which the plaintiffs themselves put upon those of 1853. There are numerous authorities to show, that, where the words of a contract are ambiguous, resort may be had to the acts or conduct of the parties to aid its construction. Thus, in *Doe d. Pearson v. Ries*, 8 Bingh. 178 (E. C. L. R. vol. 21), 1 M. & Scott, 259 (E. C. L. R. vol. 28), Tindal, C. J., says: "If the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties." Again, in *Chapman v. Bluck*, 4 N. C. 187 (E. C. L. R. vol. 38), 5 Scott, 515, the same learned judge says,—“We may look at the acts of the parties also; for, there is no better way of seeing what they intended, than seeing what they did under the instrument in dispute.”

CRESSWELL, J.(a)—Some little difficulty has arisen in disposing of this case, in consequence of the course it took at Nisi Prius. The question as opened by my Brother *Pigott*, was, whether the demurrage charged under the regulations issued by the company was payable by the consignors or the consignees. Neither party made any concession. It was admitted that the defendant knew of the regulations, and that the sacks were hired, filled, and returned to the station under them: and it was supposed that that concession involved the whole case. The various accounts rendered by the company were put in; and there the case rested. Upon full consideration of the regulations, I am of opinion that each party is to a certain extent right, and each wrong. Mr. *Manisty* admits to-day what he did not concede at the trial, viz. that *354] there must originally have been a contract between *the consignors and the company to pay demurrage, because the 2d article of the regulations of 1853 having fixed the sum payable for the hire of the sacks for the journey, the 3d article provides that “demurrage of $\frac{1}{2}d.$ per sack per week will be charged after the expiration of fourteen days,” that the hire is “to commence from the time the sacks

(a) Cockburn, C. J., and Willes, J., were sitting in the Court of Criminal Appeals.

save the station to be filled," and "that the time to be allowed for filling and returning to the station be seven days." I agree that the consignor on obtaining the sacks is to pay the stipulated charge for the journey, and to be prepared to start from the forwarding station within even days; and he must be taken to have agreed that demurrage of $d.$ per sack per week shall be paid by him for any detention of the sacks beyond the fourteen days,—so long as they continue under his control. I am of opinion that the true construction of the regulations is this, that, when the consignor obtains sacks from the company, or the contractor, and has them conveyed to a distant station either on or beyond the plaintiffs' line, whence the company would not let them go forward without a guarantee for their immediate return, his liability continues so long as the sacks containing his grain remain there; but that, when the company take a guarantee from the consignee under the terms of the 10th article, or allow the sacks to go forward without such guarantee, the sacks are no longer under the control of the consignor, and he is not responsible for their return to the depôt. It would be very hard if it were otherwise. The company have lost their right to call upon the plaintiffs, by neglecting to do what they undertake by the 10th article to do. By that article they pledge themselves not to allow the sacks to get into the hands of the consignee without exacting from him a guarantee for their return within one day. To allow the consignee to impose demurrage upon the consignor, would come very nearly within the rule as to circuitry of action. Upon the whole, [*355 it seems to me that the liability of the consignor for demurrage is limited to the detention before the commencement of the journey and at the receiving station; and that he is not responsible for any demurrage incurred after the sacks have been allowed to get into the hands of the consignee. If any demurrage is due to the plaintiffs from the defendants upon this principle of construction, the parties have agreed upon a mode of adjusting it.

CROWDER, J.—I am of the same opinion. The argument urged by Mr. *Manisty* this morning has introduced the subject in a view which differs materially from the aspect it bore when the former part of the argument took place. My impression then was, that the sole question between the parties was, whether the demurrage was to be paid by the consignor or by the consignee. But, when the 3d regulation is looked at, it seems to be very clear that the only contract for demurrage is made between the company and the consignor; and then the 10th regulation puts a limit upon the liability of the consignor. If the company had acted upon that regulation, they would have been entirely satisfied. Any other construction would impose considerable hardship upon the consignor. I therefore agree with my Brother Cresswell that the proper mode of determining this question, is, by holding that the

consignor is not liable for demurrage occurring after the sacks get into the possession of the consignee.

The rule was drawn up as follows:—

*856] “Rule absolute to enter a verdict for the plaintiffs for such demurrage, if any, beyond the sum of 1*l.* 15*s.* 6*d.*, as accrued due to the plaintiffs in 1854 in respect of the detention of sacks by the defendants as consignors for a period beyond *fourteen days after the hiring and before the delivery of such sacks to the consignees: and, in the event of no such demurrage having accrued beyond the said sum of 1*l.* 15*s.* 6*d.*, or, if the detention of the said sacks was owing to any default of the plaintiffs, then it is ordered that the verdict be entered for the defendants: and, by consent of counsel on both sides, it is ordered that it be referred to Hayes, Serjt., as arbitrator, to ascertain how the said verdict is to be entered, having regard to the circumstances and directions above stated.”

Manisty, on a subsequent day, stated that some difficulty had occurred between the parties as to whether the demurrage was payable at the end of fourteen days from the hiring, or from the expiration of the seven days allowed for filling and returning to the station.

CRESSWELL, J.—From the hiring, of course.

Rule accordingly.(a)

(a) The reference was not proceeded with, the plaintiffs assenting to a verdict being entered for the defendants.

*857] *FRENCH v. STYRING. May 8.

A. and B. being joint owners of a race horse, it was agreed between them that A. should keep and train and have the general management of the horse, conveying him to and entering him for the different races; that 35*s.* per week should be allowed for his keep; and that the expenses of keep, &c., should be borne jointly by A. and B., and the horse's winnings be equally divided between them. A. having paid all the expenses of the keep and management of the horse, and there being no winnings to divide:—Held, that, even assuming that this agreement constituted a partnership between A. and B. (which the court, dissentiente Cockburn, C., J., thought it did not),—A. was entitled to recover from B. a moiety of the disbursements made by him on account of the horse, as being in the nature of an advance of capital for B.

THE declaration in this case contained a count in which the plaintiff claimed 100*l.*, the amount of a bet alleged to have been made by him with one Littler on behalf of the defendant, and which he alleged he had paid to Littler by the defendant's authority.

There was a second count,—for work and materials, journeys made by the plaintiff at the request of the defendant, training and feeding horses for the defendant, goods sold and delivered, money lent, money paid, and money found due upon accounts stated,—under which the

plaintiff sought to recover a sum of 165*l.* 11*s.* 10*d.*, for a moiety of the expenses of keeping, training, and managing a race-horse in which the plaintiff and defendant were jointly interested.

The defendant pleaded *nunquam indebitatus*.

The cause was tried before Cresswell, J., at the sittings in London after last Michaelmas Term, when the following facts appeared in evidence :—

As to the first count, it was proved that the bet was made with the defendant's authority, and the amount paid by the plaintiff to Littler; but there was a conflict of evidence as whether or not the plaintiff was authorized to make the payment. The jury found that he was: and the court declined to disturb their verdict thereon.

As to the claim in the second count, the facts were these:—The plaintiff was a trainer of horses at Newmarket: the defendant was a wine-merchant at Huddersfield. In the month of March, 1854, a race-horse called *Census was jointly purchased by the plaintiff and [*358 one Cohen. The latter afterwards sold his share of the horse to one Mallinson; and it was agreed between Mallinson and the plaintiff that the plaintiff should keep the horse for the purpose of training him, and should have the entire control and management of him, that 35*s.* per week should be allowed as the expenses of his keep, that the plaintiff should pay the expenses of entering the horse and conveying him to the different races, that each of them should pay one-half of the horse's keep and other expenses, and that the winnings should be equally divided between them. Mallinson having subsequently sold his share of the horse to the defendant, the latter agreed with the plaintiff that he should continue to keep, train, and manage him upon the same terms as had been agreed on with Mallinson. The horse was entered and ran at several races, but never won anything, and, having ultimately broken down, was sold at Tattersall's for 20*l.* The plaintiff now sought to recover from the defendant 165*l.* 11*s.* 10*d.*, being the moiety of the keep and expenses of the horse since the defendant became possessed of his moiety, allowing in the particulars credit for 10*l.*, the moiety of the sum for which the horse was sold. There had been no previous settlement of accounts between the parties.

On the part of the defendant, it was submitted that this community of profit and loss constituted a partnership between the plaintiff and defendant, and therefore that the plaintiff could not recover in a court of law in respect of the claim set up in the second count.

The learned judge directed a verdict for the plaintiff for the amount claimed, reserving to the defendant leave to move to reduce the damages by the sum mentioned in the second count, if the court should be of opinion that the transaction created a partnership.

Atherton, Q. C., in Hilary Term last, obtained a rule *nisi [*359

accordingly. He referred to *Bovill v. Hammond*, 6 B. & C. 149 (E. C. L. R. vol. 18), 9 D. & R. 186 (E. C. L. R. vol. 22).

Hawkins showed cause.—There was no partnership here. The transaction amounts simply to this:—The plaintiff, having, at the request of the defendant, incurred all the expense of keeping the horse, conveying him to the different races, and entering him to run, seeks to recover the moiety which the defendant agreed to pay him. The horse never won anything, and therefore there was never any account to settle between the parties. [CRESSWELL, J.—This point was before the Court of Queen's Bench in a very recent case.(a)] This is not a partnership at all. [COCKBURN, C. J.—If it is, each might sell his share in the horse, and so fix the other with a partnership with the vendee.] There is in one sense community of interest, but, as to the *360 defendant's moiety of the expenses, the plaintiff paid it as the defendant's agent. [CROWDER, J.—Each might have sent in half the hay, corn, &c.] No doubt. The present case is very like that of *Helme v. Smith*, 7 Bingh. 709, 5 M. & P. 744, where it was held by this court that a part owner of a ship is not necessarily a partner, and therefore a part owner who as ship's husband incurred the expense of the outfit might sue the other part owners separately for their respective shares of the expense. In giving judgment, Tindal, C. J., said: "Part owners of a ship are not necessarily partners. If the parties had laid out money on a speculation in goods, the proceeds to be divided on the ship's return, they would have been partners in every sense; but there is nothing here to show that they were more than part-owners, and the question is, whether, if one lays out money to enable the ship to proceed, he may not sue each of the owners for his share of the expense. There is nothing to show that the plaintiff's claim was to depend on the profits of the voyage, or that he was to be deprived of remuneration if the voyage turned out to be without profit. *The outfit was a portion of the capital which each was to advance*; and, if the plaintiff had lent either of the part owners the capital he was to contribute, that would clearly have formed the ground of a separate claim." It is impossible to distinguish that case from this.(b) *Gale v.*

(a) *Hollingworth v. Buckstone*, Hilary, 1857. It was an action brought to recover the half of certain freight earned by two vessels which the plaintiff had chartered for the purpose of carrying materials to Sweden, for the Swedish Railway Company, upon an agreement whereby the defendants, the ship-brokers, were to have half the surplus freight which the ships might earn by carrying the goods of other shippers when the Swedish Railway Company did not supply a full cargo. The question was, whether the agreement was for a participation of losses and profits, so as to create a partnership between the plaintiff and the defendants, or whether the half of the surplus freight was to be paid to the defendants as a mere remuneration for their exertions in obtaining the shipments. At the trial a verdict was taken for the defendants, subject to leave reserved to the plaintiff to move to enter the verdict for him for such amount as the master should find to be due upon an account between the parties. *Hesketh v. Blanchard*, 4 East. 144, *Rawlinson v. Clark*, 15 M. & W. 292,† *Stocker v. Brocklebank*, 3 M.N. & G. 250, and *Bovill v. Hammond*, 6 B. & C. 149, 9 D. & R. 186, were cited upon the motion. The rule is yet pending.

(b) And see *Wilson v. Whitehead*, 10 M. & W. 503.† There, A., B., and C. verbally agreed that they should bring out and be jointly interested in a periodical publication. A. was to be the

Jackie, 2 Stark. *N. P. C. 107 (E. C. L. R. vol. 3), is also an authority very much in point. A. agreed with B. to supply him [*361 with a manuscript work to be printed by B., the profits of which were to be equally divided. An action having been brought by B. against A. for refusing to supply the manuscript, it was objected for the defendant that the action was not maintainable, since it was brought by one partner against another, in order to recover partnership profits. But Lord Ellenborough said: "I cannot accede to this objection: the action is not brought against the defendant to recover partnership profits, but for not contributing his labour towards the attainment of profits to be subsequently divided between the parties. I have known similar actions brought in several cases; for instance, actions for not entering into partnership according to an agreement."

Atherton, Q. C., and *Manisty*, in support of the rule.—The plaintiff and defendant became joint owners or partners in the horse in question; and, consequently, this demand arising out of a partnership transaction, and no account having been settled between them, according to the principle laid down in *Bovill v. Hammond*, 6 B. & C. 149, 9 D. & R. 186, the action is not maintainable. [COCKBURN, C. J.—If a partnership, it is one of a very anomalous nature: either might sell his interest in the horse, and so impose upon the other another partner.] Two persons having an interest in an undivided and indivisible chattel, must necessarily be partners. [WILLES, J.—In *Littleton*, § 221, it is said, that, "If two have jointly, by gift or by buying, a horse or an ox, &c., and the one grant that to him belongs of the same horse or ox to *another, the grantee and the other which did not grant shall [*362 have and possess such chattels in common."'] The agreement here was, that the plaintiff should keep, train, and manage the horse, entering it for the different races, paying all necessary expenses; and, if the horse won, half the stakes were to be the property of each party, and, in the event of loss, each was to bear his share of the loss. There is nothing to distinguish the case from that of an ordinary partnership: the circumstance of its relating to an isolated transaction, and that there is loss but no profit, makes no difference. Suppose profit had been made, and the present defendant had brought an action for his share, he clearly could not have recovered. [CRESWELL, J.—If the plaintiff had incurred debts in keeping the horse, for corn and hay, or for a farrier's bill, or had contracted a debt with an innkeeper on a journey, would the defendant have been liable?] It is submitted that he would

publish, and to make and receive general payments, B. to be the editor, and C. the printer; and, after payment of all expenses, they were to share the profits of the work equally. C. was to furnish the paper, and charge it to the account at cost prices. No profits were ever made, nor any accounts settled. The plaintiff furnished paper to C., for the purpose of being used by him in printing the periodical: and it was held that A. and B. were not jointly liable with C. for the price of it.

But see *Barry v. Neesham*, 3 C. R. 541 (E. C. L. R. vol. 54).

be liable for every debt necessarily incurred in furthering the joint interests of the partners. [CRESSWELL, J.—In the case of a partnership, the law gives to each authority to contract debts for the concern: but there is no such implied authority where there is no partnership.] The ordinary test of partnership is, the right to share in profit, and the liability to contribute to loss. In *Pott v. Eyton*, 3 C. B. 32, 39, Tindal, C. J., says: "Traders become partners between themselves by a mutual participation of profit and loss: but, as to third persons, they are partners if they share the profits of a concern; for, he who receives a share of the profits, receives a part of that fund upon which the creditors of the concern have a right to rely for payment, and is therefore to be made liable to losses, although he may have expressly stipulated for exemption from them." [CRESSWELL, J.—That has been said ever since the case of *Waugh v. Carver*, 2 H. Bla. 285: and some judges *363] have pronounced it to be a very bad rule.(a)] The claim is in respect of a series of advances resulting in a partnership account. [COCKBURN, C. J.—Would there be a right of survivorship in this case?] Yes; at law. [COCKBURN, C. J.—Would not the plaintiff have been entitled to call upon the defendant from week to week to pay his proportion of the expenses incurred in the keep, &c., of the horse?] It would only have been matter of account: it could not have been recovered at law. [COCKBURN, C. J.—Instead of contributing his share of the expenses of keeping and training the horse, the defendant gets the plaintiff to advance it for him. Was the advance made quâ partner or quâ creditor?] The advance clearly formed a partnership account, which can only be adjusted in a court of equity.

COCKBURN, C. J.—I am of opinion that this rule should be discharged. I think the fair result of the evidence is, that there was no partnership between the plaintiff and the defendant in the horse in question. They were owners in common, each being entitled to an undivided moiety,—part owners, but not partners in the ordinary sense of the term. I incline to agree with the defendant's counsel, that, though not partners in the horse, the plaintiff and defendant might be partners in the mode of working and managing it for their common benefit. They appear to have come to an agreement that the horse should be kept and trained by the plaintiff, and entered at races to run for the common benefit of the two, that a certain sum should be allowed weekly for the horse's keep, and that there should be an equal division of the profit and loss between them. That, I think, would constitute *364] a partnership between them in the management of the horse. But then comes the question, whether the plaintiff may not, notwithstanding such partnership, recover from the defendant his proportion of the disbursements made by him in keeping, training, running,

(a) Probably alluding to a discussion in the Exchequer Chamber in *Hickman v. Cox*, which now (Michaelmas Term, 1857) stands for judgment.

and managing the horse. Now, it is incidental to every partnership that there shall be capital advanced by the partners for the purpose of carrying on the concern. It seems that the capital in this case consisted of the necessary disbursements for the horse's keep, and for working it for the common benefit. If the two had agreed that a certain sum should be contributed by them in equal moieties as the capital for the partnership, and the defendant had failed to advance his share, and the plaintiff had advanced it for him, there could be no doubt that the plaintiff would have been entitled to maintain an action for the capital so advanced. Now, it being agreed that each should contribute a moiety of the stipulated capital, it clearly can make no difference in principle whether such capital is all advanced at the outset or from time to time as the necessities of the concern require it. Here, instead of obtaining advances from time to time from the defendant, it seems the plaintiff paid his share of the expenses for him. No doubt, the moment money is paid in as capital, it becomes part of the partnership fund, resulting only in matter of account, and cannot be made the subject of an action at law. But that is clearly distinguishable from advances made by one partner, not to the concern, but to the other in respect of what he is to contribute to the joint capital; and there is no principle of law that I am aware of which prevents such advances from being recovered back: it is a matter altogether dehors the partnership. Without, therefore, in the slightest degree intending to trench upon any of the fundamental principles of the law of partnership, it appears to me that we may give effect to what justice demands here, by holding that the plaintiff is entitled to recover the debt claimed in his second [*365 count.

CRESSWELL, J.—I am of the same opinion. Assuming that the agreement between these parties to keep, train, and run the horse in question constituted a partnership between them, I think the payments made by the plaintiff amounted to an advance by one partner of capital on behalf and at the request of the other, and may be recovered in an action at law. I do not feel at all pressed by the difficulty suggested by Mr. *Manisty*, as to the complication of the account, where there are advances on behalf of each other in the case of a partnership consisting of several members. However complicated the account, the principle remains the same. This is the simple case of an advance of capital by one partner at the request of the other.

CROWDER, J.—I also think the plaintiff is entitled to recover in respect of the demand in the second count. It seems to me to be very doubtful whether there was any partnership at all between the plaintiff and the defendant. There clearly was no partnership in the horse: it was a mere case of joint ownership. But it is said the agreement that the horse should be kept, trained, and run for stakes, and the winnings divided between the joint owners, constituted a partnership between

them. If so, what is the capital? The money required for keeping, training, and conveying the horse to the various races for which he might be entered,—in other words, the money expended in placing the horse in a condition to win the stakes. Suppose, instead of the agreement that the plaintiff should provide for those incidental expenses from time to time as they arose, it had been calculated that a sum of 100*l.* would be required for the purpose, of which each party was to *advance 50*l.*,—could there be a doubt, that, if the plaintiff #366] advanced the 50*l.* for the defendant, at his request, he could recover it back by an action? If so, it can make no difference, that, instead of being advanced in one sum at the commencement, the defendant's share of the capital was advanced by the plaintiff from time to time in such sums as the common purpose required.

WILLES, J.—I am entirely of the same opinion. The agreement here amounts to the sort of tenancy in common mentioned in the section of Littleton to which I referred in the course of the argument. The effect of the agreement seems to be this,—that the plaintiff should keep and train and have the exclusive management of the horse, entering it and conveying it to the different races, and doing everything necessary to put it in a condition to run, and, in the event of the horse winning, paying over to the defendant one-half of the amount of such winnings. It in truth amounts to no more than a contract between two tenants in common, whereby the one agrees, in consideration of certain things to be done by the other, to abstain from exercising his rights in respect of the chattel held by them in common. It is no more a partnership than if two tenants in common of a house agreed that one of them should have the general management, and provide funds for necessary repairs, so as to render the house fit for the habitation of a tenant, and that the net rent should be divided between them equally. Even if this were to be looked upon as a contract of partnership, the point at which the partnership would necessarily commence, is, that at which the horse is put upon the turf in a condition to run for stakes. The payments sought to be recovered here, are, payments made by the plaintiff in the nature of advances on behalf of the defendant anterior #367] to the time at which any partnership could *commence. Without expressing any decided opinion upon the first point, upon the second ground I concur with the rest of the court in thinking that the plaintiff is entitled to recover upon the second count as well as upon the first, and therefore that the rule to reduce the damages must be discharged.

Rule discharged.

Where two or more purchase a tract of land together, under an agreement (doubtful yet), as there is but one item that it shall be re-sold and the profit divided (supposing that a technical partnership exists between them, which is to settle between them, assumpsit may be maintained against the party who

received the proceeds of the re-sale; and the purpose of profit does not create it is not necessary to resort to an action such a partnership as confines the remedy of either, to obtain the fruits of their purchase, to the action of account render: *Brubacker v. Robinson*, 3 Penna. Rep. 295.

An agreement between two to enter into a single transaction of buying for See *Wood v. Merrou*, 25 Vermont, 340.

LEIGH and Wife, Executor and Executrix of HENRY HOW, deceased, v. ANN BAKER, Executrix of WILLIAM BAKER, deceased. May 5.

A writ issued under the Bills of Exchange Act, 1855, 18 & 19 Vict. c. 67, in a case which is not within the act,—the bill or note having become due and payable more than six months before,—may, by virtue of the 222d section of the Common Law Procedure Act, 1852, be amended, by turning it into a writ under the last-mentioned act.

The defendant was, in May, 1856, served with a writ of summons under the Bills of Exchange Act, 1855, for the recovery of principal and interest on a promissory note alleged to have been made by her testator in March, 1851, payable on demand. No appearance having been entered, judgment was signed, and execution issued. Nine months afterwards, the defendant moved to set aside the writ and subsequent proceedings, on the ground that they were coram non iudice and void, and also suggesting that the testator's signature to the note was a forgery. The court refused to set aside the writ, but allowed it to be amended, upon terms, by making it a specially endorsed writ under the 25th section of the Common Law Procedure Act, 1852.

THIS was an action brought by the plaintiffs as executor and executrix of Henry How, deceased, to recover 110*l.* 17*s.* for principal and interest on a promissory note in the following form:—

"1851. March 3d.

"We, Robert Norman, John Norman, yeomans, of Northmolton and Winsford, William Baker, cordwainer of Winsford, jointly and separately do hereby promise to pay, *on demand*, unto Henry How, sen., of East Anstey, in the county of Devon, on his order, the sum of one hundred pounds of lawful money of Great Britain, with interest at 5 per cent., for value received by me Robert Norman this third day of March, one thousand eight hundred and fifty-one. Witness our hands,

"£100.

"ROBERT NORMAN.

"JOHN NORMAN.

"ELIZABETH HOW."

"WILLIAM BAKER."

*In May, 1856, the defendant was duly served with a writ of summons endorsed pursuant to "The Summary Procedure on Bills of Exchange Act, 1855," 18 & 19 Vict. c. 67. On the 3d of June, judgment was signed in the form given in schedule B. to the act annexed; and a fi. fa. issued de bonis propriis of Ann Baker.

Field, on a former day in this term, obtained a rule calling upon the plaintiffs to show cause why the writ of summons and all subsequent proceedings had thereon should not be set aside, or why the judgment

signed in this cause and all proceedings had thereon should not be set aside, or why the said judgment and subsequent proceedings should not be set aside, and the defendant be at liberty to appear to the said writ of summons and to defend the action.(a)

*369] *The act is limited to actions brought within six months after
 *370] the bill or note shall have become payable. *This note was made in March, 1851, and was payable on demand; it was, therefore, due and payable immediately, and consequently the act does not apply to it, and the whole proceeding is a nullity. [CRESSWELL, J.—The action is the demand.] The statute of limitations would begin to run

(a) The affidavit upon which the rule was moved was made by the defendant, who was described as "widow of William Baker, deceased, late of Winsford," and George Baker, her son. The former deposed that she was served with the writ of summons in this action in May last; that, at that time, and up to the time when she first consulted her attorney in this case, on or about the 17th of March, 1857, as hereinafter mentioned, she was wholly ignorant of the law in such matters, and of all proceedings thereunder, and that she then and still lived at a distance of nearly twenty miles from any attorney, and that she then and still was very infirm, and for those reasons neglected to appear to the writ, or to take any steps in the matter; that she was some time afterwards informed that judgment had been signed in this action; that, about a month after she was served with the said writ, an officer of the sheriff of Somerset took possession of three leasehold dwelling-houses and premises left to her by the will of her late husband, and remained therein with her and her son (the other deponent) for upwards of a month, when the said dwelling-houses were sold to one William Quarty; that, shortly after she had heard that the said judgment had been so signed against her in this action, she went with her daughter Eliza Webber to the office of Messrs. Pearse & Crosse (the plaintiffs' attorneys), in Southmolva, and there saw the promissory note upon which this action was said to be founded, and which purported to be signed by her late husband, William Baker, and she and her said daughter perceived that the name of William Baker signed on the promissory note was not the handwriting of her late husband; that she verily believed the said signature "William Baker" was not the handwriting of her late husband; that she verily believed the said signature "William Baker" was not the handwriting of her late husband; that she verily believed the said signature "William Baker" was not the handwriting of her late husband, never was indebted to the said Henry How, the payee of the said note, and that he never became surety to him for any other person, and she believed, that, if he had been so indebted, or had so become surety, he would have informed her thereof; that the words "William Baker, cordwainer, of Winsford," appeared to have been interlined in the body of the said note, and that the said signature "William Baker" was written the last of the signatures at the foot of the said note; that she then and still believed that the said signature was a forgery; that, a few days after she and her said daughter had so inspected the said note, her son George Baker (the other deponent) told her he had been to the office of Messrs. Pearse & Crosse, the plaintiffs' attorneys, and had seen the said note, and found that the signature "William Baker" was not her said husband's signature, but that the said Mr. Crosse had told him, that, judgment having been signed in the action, it was too late to dispute the note; that she believed this statement of Messrs. Pearse & Crosse to be true, and, in consequence thereof, and of her ignorance of the law, she took no steps to obtain legal redress until she explained the facts to Mr. Waldron, attorney, of Wivillcombe, as thereinafter mentioned; that, on or about the 17th of February last, she was served with a writ of ejectment brought by the said John Leigh against her and her said son, George Baker, and Isabella Gunter, to obtain possession of the above dwelling-houses; that she had been informed, and believed, that the said William Quarty did not complete the purchase of the dwelling-houses and premises from the sheriff, and that the same were in fact purchased from the sheriff by the said John Leigh, and that he was in consequence bringing the said ejectment; that, on being served with the said writ of ejectment, and understanding she should be turned out of the house, she went to consult the said Mr. Waldron thereon, and then explained to him the facts thereinafore mentioned; and that the said Mr. Waldron had informed her that the proceedings in this action on the part of the plaintiffs had been wrong, and had advised her to apply to have them set aside. The other deponent, George Baker, also swore positively that the name "William Baker" at the foot of the promissory note in question was not in the handwriting of his late father, and that he never knew or heard, and did not believe, that his father was ever indebted to the said Henry How, or ever became surety to him for any other person.

from the date: *Norton v. Ellam*, 2 M. & W. 461.† [WILLES, J.—It could not be said to be an over-due note, so that a person taking it would take it subject to its equities.] No. The judgment is wrong in form also: the 1st section of the act (a) only authorizes a judgment *in the form given in schedule B., and that is a judgment against the defendant personally, there being no words in the section to [371 allow of any deviation from that form. This is an action against the defendant as executrix: and it may well be doubted whether the statute intended to apply to actions against executors or administrators. [CRESWELL, J.—So far as regards the irregularity in the writ of summons, the application comes very late.] The affidavit sufficiently, it is submitted, explains the delay. The *fi. fa.* is also irregular, inasmuch as it is to be levied *do bonis propriis*. [CRESWELL, J.—The *fi. fa.* would necessarily follow the judgment.] The judgment is clearly a nullity. It would be bad on error: and, as the act, by s. 1, takes away the writ of error, the only remedy the party can have, is, by application to the court.

Lush afterwards moved, on the part of the plaintiffs, for a rule nisi to amend the judgment and writ. The court directed, that, instead of granting a cross-rule, it should be made a term in the defendant's rule, that the plaintiffs should be at liberty at the time of showing cause to renew the application to amend the judgment and *fi. fa.*

**Lush* now showed cause.(b)—The rule is founded upon the affidavit of the defendant and her son: neither of the parties to [372 the note makes any affidavit. [CROWDER, J.—Is there an affidavit by Elizabeth How, the witness?] No. [*Field*.—There is an affidavit of an

(a) The 1st section enacts, that, "from and after the 24th of October, 1855, all actions upon bills of exchange or promissory notes commenced within six months after the same shall have become due and payable, may be by writ of summons in the special form contained in schedule A to this act annexed, and endorsed as therein mentioned; and it shall be lawful for the plaintiff, on filing an affidavit of personal service of such writ within the jurisdiction of the court, or an order for leave to proceed, as provided by the Common Law Procedure Act, 1852, and a copy of the writ of summons and the endorsements thereon, in case the defendant shall not have obtained leave to appear and have appeared to such writ according to the exigency thereof, at once to sign final judgment in the form contained in schedule B. to this act annexed (on which judgment no proceeding in error shall lie), for any sum not exceeding the sum endorsed on the writ, together with interest, at the rate specified (if any), to the date of this judgment, and a sum for costs to be fixed by the masters of the superior courts, or any three of them, subject to the approval of the judges thereof, or any eight of them (of whom the Lord Chief Justices and Lord Chief Baron shall be three), unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way, and the plaintiff may upon such judgment issue execution forthwith."

(b) The affidavits filed in opposition to the rule, stated, amongst other things, that, on or about the 15th of July, 1856, the sheriff of Somerset caused the three cottages seized under the writ of *fi. fa.* to be advertised for sale at Winsford on the 21st of that month, and that the plaintiff John Leigh and several other persons attended the said sale, when William Quartly was the highest bidder for, and became the purchaser of, the said premises at and for the sum of 150*l.*; that Quartly afterwards relinquished the contract in favour of John Leigh; that the amount of debt and taxed costs owing under the execution, including the said execution, was 116*l.* 15*s.*, which sum was allowed to him in account in the said purchase-money of 150*l.*; and that the balance thereof, amounting to 33*l.* 5*s.*, was paid by him to the sheriff, and a proper deed of assignment from the said sheriff of the premises, dated the 28th of July, 1856, was executed by him to the said John Leigh.

application made to her, and of her refusal to make any affidavit.] It appears from the affidavits in answer that the plaintiffs' testator, Henry How, died in June, 1855. This application,—which resolves itself into a mere question of irregularity,—is too late: it is not made until ten months after the service of the writ, and nine months after judgment signed and execution executed. [CRESSWELL, J.—Have you any affidavit explaining the circumstances under which the note was made?] None. [COCKBURN, C. J.—Is not that which is complained of something more than mere irregularity? It is contended on the other side that the case is not within the statute at all, inasmuch as the statute only applies to bills and notes which became due and payable within six months before the commencement of the action, and does not apply to actions against *373] personal representatives.] Still, it is submitted, it is merely irregularity. [COCKBURN, C. J.—It is more than irregularity: the act altogether changes the procedure. CRESSWELL, J.—Is the defendant liable in any other capacity than executrix?] No. The court, however, have power to amend the writ, if necessary, so as to make it a good writ under the Common Law Procedure Act, 1852. [COCKBURN, C. J.—If the case is one which is not within the statute, the necessary consequence is that the whole proceedings fall to the ground. The statute gives the court a new summary jurisdiction, to be exercised only in certain circumstances. If the writ has issued in a case to which the provisions of the act do not apply, the whole proceedings are coram non iudice.] The fact of the writ of error being taken away shows that the legislature intended technical objections to have no weight. [COCKBURN, C. J.—The very fact of the defendant being deprived of *that* remedy ought to make us more cautious in exercising the new jurisdiction thus created. Are you prepared to argue that the court is to enforce proceedings upon a writ which the plaintiff has thought fit to issue in a case which is not within the statute?] Yes. The execution, and perhaps the judgment, may be wrong; but they are amendable. [COCKBURN, C. J.—Do you admit that the case is not within the statute?] It must be conceded that the note upon which the action is brought is not within the statute, a note payable on demand being payable immediately; but not that the statute does not apply to executors. The proceedings, though irregular, are not *void*. Assuming, for the sake of argument, that an executor is not within the act, the only way of taking advantage of that would but for the prohibitory words in s. 1, be by writ of error. [CRESSWELL, J.—Suppose, before the passing of the act, a writ had issued in this form, what would be the result?] It would have been an irregularity only: the writ is still a *374] writ of the court. *[COCKBURN, C. J.—The statute introduces a new system of procedure of a very special and peculiar nature. Must it not be confined strictly to such cases as properly fall within it?] That being conceded, the question is, what is the consequence? The

proceeding cannot be void ; for, error will not lie. Then, the 7th section enacts that "the provisions of the Common Law Procedure Act, 1852. and the Common Law Procedure Act, 1854, and all rules made under or by virtue of either of the said acts, shall, so far as the same are or may be applicable, extend and apply to all proceedings to be had or taken under this act." Here, the plaintiff seeks to apply the provisions of the Common Law Procedure Act, 1852. By that act, three several forms of writ of summons are given,—one, under s. 2, where the defendant is residing within the jurisdiction of the court,—a second, under s. 18, where the defendant is a British subject residing out of the jurisdiction of the court, in any place except in Scotland or Ireland,—a third, under s. 19, where the defendant is a foreigner residing out of the jurisdiction of the court : and in each case the form is given. Suppose a defendant were served with a writ in a form not properly adapted to the particular case, could it be contended with any hope of success that the process was therefore irremediably void ? That case is specially provided for by s. 21, which enacts, that, "if either of the forms of writ of summons contained in the schedule A. to the act annexed, and marked respectively Nos. 1, 2, and 3, shall by mistake or inadvertence be substituted for any other of them, such mistake or inadvertence shall not be any objection to the writ or any other proceeding in such action, but the writ may, upon an *ex parte* application to a judge, whether before or after any application to set aside such writ or any proceeding thereon, and whether the same or notice thereof shall have been served or not, be amended by such judge, without costs."

*[COCKBURN, C. J.—That would seem to imply, that, but for [*375 that provision, it could not have been done.] Precisely so. That provision is applicable to the Bills of Exchange Act, by virtue of the 7th section. The writ in this case is by mistake substituted for a writ under the Common Law Procedure Act : and the court is asked to amend it. [COCKBURN, C. J.—Then the defendant must be let in to appear and defend.] There she is met by the insuperable objection that she has allowed the time to go by. It must be assumed that she knew of the irregularity when she was served with the writ. [COCKBURN, C. J.—It must not be assumed that this is a mere irregularity. The question is whether the whole proceeding is not a nullity.] The whole scope of the statute shows that it is not a nullity, but a mere irregularity, which is amendable, and which may be waived by laches. [COCKBURN, C. J.—The statute introduces an entirely new course of proceeding, unknown to the law. A defendant who is served with process under it cannot defend the action,—which is the common law right of every subject,—without the special leave of a judge. If a plaintiff issues a writ in a case which is properly within the contemplation of the act, then he is of course entitled to the benefit of all the provisions as to amendment contained in the Common Law Procedure Acts : but, if he

chooses to misapply the process created by the act in a case not within the purview of the act, I do not see how he can avail himself of those provisions.] It is only where the proceeding is in a form not warranted by the statute that resort need be had to the powers of amendment contained in the Common Law Procedure Acts. If the statute now in question had formed part of the Common Law Procedure Act, 1852, as it might have done, there would have been a fourth form of writ. [CROWDER, J., referred to *Knight v. Pocock*, 17 C. B. 177 (E. C. L. R. vol. 84), where, upon a motion to set aside the copy and service of

*376] a writ *under this act, on the ground of an irregularity in the endorsement, the court allowed the writ and copy to be amended, under the 20th section of the Common Law Procedure Act, 1852.] There can be no greater difficulty in applying the 21st section of that act to a proceeding under this act, than the 20th section. [COCKBURN, C. J.—It is difficult to see how you can apply the provisions of the Common Law Procedure Act as to three writs, to an act which gives but one form of writ.] The amendment might, it is submitted, be made under s. 96 of the Common Law Procedure Act, 1854, which enacts, that “it shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at *Nisi Prius*, at all times to amend all defects and errors in any proceedings under the provisions of this act, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for.” [CRESSWELL, J.—The 222d section is much more favourable for you. If you claim to amend under the Bills of Exchange Act, it must be for the purpose of making the writ a good proceeding under that act: whereas, the 222d section of the Common Law Procedure Act, 1852, confers a general power of amendment applicable to all proceedings in all civil actions. COCKBURN, C. J.—The amendment proposed takes the case out of the Bills of Exchange Act: with that amendment of the writ, all the subsequent proceedings necessarily fall.] Not so, it is submitted. The amendment of the writ would make it a specially endorsed writ under the Common

*377] Law Procedure Act; and there has *been no appearance. [COCKBURN, C. J.—The defendant asks us to annul all the proceedings because they are *coram non iudice*.] The court must exercise its discretion as to the terms upon which the amendment is to be allowed, regard being had to all the powers of amendment contained in the former acts.

Field, in support of his rule.—It is submitted, that that which is complained of here is matter of substance, and not mere irregularity,

and that the court has no power to make the amendment proposed. [CRESWELL, J.—Do you contend that the writ would not have been amendable if the application for that purpose had been made before the expiration of the time for entering an appearance?] No amendment could have been made even then. The 21st section of the Common Law Procedure Act, 1852, clearly is not applicable to this case, and is not incorporated with the Bills of Exchange Act, 1855. That section is expressly limited in its operation to the three writs mentioned in the 2d, 18th, and 19th sections, which differ merely in the mode and place of service and the time for appearance, the subsequent proceedings under each being the same. And, as to the 222d section, the power of amendment thereby created is, only to make the proceedings conformable to what they were intended to be: but it confers upon the court no power to convert a writ of the peculiar nature of that now in question, giving a remedy which was before unknown to the law, into a common law writ, attended with consequences altogether different.

[CROWDER, J.—I certainly have allowed amendments of this sort many times at chambers, without challenge, where it has turned out that the writ was issued more than six months after the bill or note became due.

WILLES, J.—I have done the same.] The amendment which the 222d section deals with seems to contemplate an *existing suit*: the amendment here sought destroys the existing suit. [*378

J.—Not so. This is an action by the plaintiffs against the defendant upon a promissory note: the question in controversy between the parties in the suit, is, whether or not the defendant is liable on the note.] The object of the amendment is, to create a new suit attended with entirely different consequences. It may, indeed, be doubted whether the proceeding here was a suit at all,—the suit being a mere mode of bringing the defendant into court. [CRESWELL, J.—When do you say it becomes a suit?] When a declaration is delivered. [CRESWELL, J.—I cannot assent to that.] At all events, this is not a case to which any of the powers of amendment can properly be applied.

COCKBURN, C. J.—I must confess I am not quite satisfied that this is a case in which the court has power to amend. Inasmuch, however, as my learned Brothers are all agreed that it is a fit case for amendment upon terms, and that we have power to amend, I will not hold out against their opinions.

CRESWELL, J.—I am of opinion that this is a case in which we have power to amend the writ so as to make it a good writ under the Common Law Procedure Act, 1852. It appears that this power has been repeatedly exercised by my Brothers Crowder and Willes at chambers; and I think I have myself done the same. I arrive at this conclusion with the more confidence, because one of my learned Brothers has peculiar means of knowing what the intention of the

framers of the act was. It seems to me that Mr. *Field* has successfully disposed of the 21st section of the Common Law Procedure Act, 1852. But I think we clearly have power to amend under s. 222, which contains the largest possible words,—“It shall be lawful for the superior *379] courts *of common law, and every judge thereof, and any judge sitting at Nisi Prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made.” There can be no doubt that the real question to be tried here, was, whether or not the plaintiffs were entitled to recover against the defendant the amount of the promissory note. The plaintiffs erroneously thought they could recover it under the 18 & 19 Vict. c. 67. It turns out that he cannot do so. The power of amendment must be dealt with as it would have been dealt with if the application to amend the writ had been made the day after it issued. If the application had been so made, I think it is impossible to say that the case would not have been in terms within the 222d section. This is an error in a proceeding in a civil cause,—the writ has been erroneously issued. Mr. *Field* was driven to contend that this is not a suit at all; but in this he could hardly have been serious. I am clearly of opinion that it is a proper case for amendment, and that the only question is as to the terms upon which it ought under the circumstances to be made. My Brother Willes is prepared to suggest what these should be.

CROWDER, J.—I am entirely of the same opinion. As I have already stated, I have repeatedly allowed writs which have been improvidently issued under the statute in question, to be amended, I always considered *380] such amendments quite consistent with the spirit of the *222d section of the Common Law Procedure Act, 1852. I think Mr. *Field* has not succeeded in showing that there is no suit here, or that the real question in controversy between the parties is not whether the amount claimed on the promissory note is not due.

WILLES, J.—I am of the same opinion, upon the construction of the 222d section of the Common Law Procedure Act, 1852. It appears to me that the 7th section of the Bills of Exchange Act, 1855, makes it incumbent on the courts to construe that as an act in *pari materia* with the Common Law Procedure Acts, 1852, and 1854. Although the process under this statute is of a very peculiar character, the defendant not being allowed to appear and defend except by leave of a judge, still it is to be treated in all other respects as any other writ for the commencement of an action, and subject to the like powers of amend-

ment. And, after all, there is hardly a greater difference between this writ and the ordinary writ of summons under the Common Law Procedure Act, 1852, than that which is there recognised between the writ mentioned in s. 2 and the writs provided for by ss. 18, 19, for service upon persons residing out of the jurisdiction of the court. The 222d section applies as much to the one as to the other. If, then, the writ may be amended, the question is, upon what terms that amendment should be allowed; and this is a matter of some difficulty, more especially as the proceedings which require to be amended were taken in May, 1856, when they could not have been taken in May, 1857. If the writ were amended as to the date simpliciter, that might give rise to a difficulty. The most convenient way to do it probably will be, to let the service stand, as in *Knight v. Pocock*, 17 C. B. 177. Then, the judgment must be set aside, and neither party must set up the proceedings under the judgment in support or defence of this action.

*The defendant ought to be allowed a reasonable time to appear, [381 otherwise the plaintiffs to be at liberty to sign judgment as upon a specially endorsed writ. It appears that the judgment was for the amount of the bill and interest, amounting with costs to 116*l.* 15*s.*, and that the property taken was sold for 150*l.*, and that the plaintiff, the purchaser having failed to complete, took the cottages, paying the difference, 33*l.* 5*s.* It may be a question how far the judgment and writ would afford a defence to the sheriff or the purchaser: if, therefore, the defendant should object to the terms I propose, it may be necessary to make some order to provide against that. I think the plaintiff should retain the cottages, and the defendant the money, until the further order of the court or a judge. If these terms are assented to, it will not be necessary to impose any hostile order upon the parties.

With respect to the costs, inasmuch as there has been great delay on the one side, and irregularity on the other, the costs should be costs in the cause.

The rule was afterwards drawn up as follows:—

Rule absolute,—“that the judgment signed in this cause be set aside, and that the writ of summons issued herein be considered as amended as of its original date, and as if specially endorsed under the Common Law Procedure Act, 1852, and that the service of the said writ on the defendant do stand, the said defendant being at liberty to appear to such writ within a week, and in default thereof the plaintiffs to be at liberty to sign judgment: And it is further ordered that neither of the said parties shall set up the proceedings under the said first-mentioned judgment in support or defence of this action: And it is further ordered that the said plaintiff John Leigh do retain the cottage or cottages, *if more than one, now in his possession, purchased on [382 the sale thereof by the sheriff of Somerset under the writ of fi. fa. issued upon the said first-mentioned judgment, and the said defendant

the other cottage or cottages now in her possession, until a judgment shall be obtained in this cause, or until the further order of this court, or one of the judges thereof; the respective parties in this cause by their counsel hereby undertaking to abide by such further order as the court, or one of the judges thereof, shall make as to the said cottages, the value thereof, or the balance of the purchase-money: And it is further ordered that the action of ejectment, and the costs of either of the said parties of and occasioned by the said judgment and subsequent proceedings, and of the action of ejectment, and this application to the court, do respectively abide the event of this cause."

WEEDING v. MASON. May 6.

Upon the execution of a writ of inquiry, in an action for dilapidations, two surveyors were called on each side: those called for the plaintiff estimated the dilapidations, the one at 119*l.*, the other at 124*l.*: those called for the defendant estimated them, the one at 63*l.* 15*s.*, the other at 68*l.*: the jury returned a verdict for 36*l.* 10*s.*:—The court ordered that the inquisition be set aside without costs, unless the defendant would consent to the verdict being entered for 63*l.* 15*s.*

THIS was an action for dilapidations. The defendant having suffered judgment by default, two surveyors who were called as witnesses for the plaintiff upon a writ of inquiry, estimated the dilapidations, the one at 119*l.*, the other at 124*l.*: the defendant, on the other hand, also called two surveyors, one of whom estimated the dilapidations at 63*l.* 15*s.*, the other at 68*l.* The jury returned a verdict for the plaintiff for 36*l.* 10*s.*

Maude, on a former day in this term, obtained a rule nisi to set aside the inquisition on the ground of the *insufficiency of the damages, unless the defendant would consent to the damages being increased to 63*l.* 15*s.*

Petersdorff showed cause, submitting that the amount of damages was purely a question for the jury, and one with which the court would not interfere.

Maude, in support of the rule, was stopped by the court.

COCKBURN, C. J.—The defendant will do well to accept the alternative offered by the rule, and consent to the verdict being entered for the lowest of the two estimates of his own witnesses. As it now stands, the verdict is far from satisfactory.

Petersdorff submitted, that, if a new inquiry were granted, it should be on payment of costs.

COCKBURN C. J.—I think we ought not to impose such terms, if the defendant rejects so reasonable an offer. The rule must be made absolute for a fresh inquiry, unless the defendant will consent to the terms proposed.

The rest of the court concurring,

Rule accordingly.

***YOUENS v. KEEN and BATES. May 8. [*384**

A motion for leave to sign judgment and issue execution under the 210th section of the Common Law Procedure Act, 1852, may be made to the court, and is absolute in the first instance.

THIS was an action of ejectment brought to recover possession of a piece of land and a messuage at Islington.

Barnard moved for judgment and execution against the defendants under the 210th section(a) of the *Common Law Procedure Act, [*385 1852 (15 & 16 Vict. c. 76), upon affidavits stating that the writ of summons was personally served upon one of the defendants (Keen), who was the lessee of the premises sought to be recovered; and, as to the other defendant (Bates), upon an affidavit of an agent of the plaintiff, stating that he went to the premises for the purpose of serving the writ, but was unable to obtain admittance, and that he thereupon affixed a copy of the writ on the outer door of the premises, that half a year's rent was in arrear, and that there was a power of re-entry reserved for non-payment of rent; and a further affidavit, that, upon a subsequent visit to the premises for the purpose of ascertaining whether or not the premises were empty, a person who stated that his name was Bates looked out of the first floor window, and told the applicant that there were a few articles of furniture *of trifling value in the messuage, [*386 and that they belonged to the defendant Keen, that he (Bates)

(a) Which enacts, that, "in all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor to whom the same is due hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any further demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, or, in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage, or, in case such action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such writ in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing such writ in ejectment shall stand in the place and stead of a demand and re-entry; and, in case of judgment against the defendant for non-appearance, if it shall be made appear to the court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears, that a half-year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded and a re-entry made; and, in case the lessee, or his assignee, or other person claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together, with full costs, and without proceeding for relief in equity within six months after such execution executed, then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease; and if on such ejectment a verdict shall pass for the defendant, or the claimant shall be nonsuited therein, then in every such case such defendant shall have and recover his costs; provided that nothing herein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, so as such mortgagee shall and do, within six months after such judgment obtained and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part and behalf of the first lessee, are or ought to be performed."

was about to remove them, that he had been occupying the said messuage by the permission of Keen, and that there was no sufficient distress to be found upon the premises countervailing the arrears of rent then due. [WILLES, J.—Should not this application have been made to a judge at Chambers?] The language of the section would seem to confine it to the court. [WILLES, J.—According to Mr. Justice Wilmot, in his judgment in *The King v. Almon*, Wilmot's Notes, 243, 246, "the court" in s. 210, means "a judge of the court." The word court says that learned judge, means "the judges who constitute it, and who are intrusted by the constitution with a portion of the jurisdiction, defined and marked out by the common law or acts of parliament."'] It was usual under the analogous provision of the 57 G. 3, c. 52, to make the application to the court.

PER CURIAM.—Take a rule.

Rule absolute. (a)

(a) See 1 & 2 Vict. c. 74, s. 1.

*387] *HOPE v. FENNER and Another. May 6.

In order to determine whether or not a plaintiff is liable to costs under the 86th section of the Bankrupt Law Consolidation Act, 1849, for having without reasonable or probable cause made an affidavit of debt to found a summons under s. 78, regard must be had to the surrounding circumstances and to the law, and not merely to the belief operating on his mind at the time.

THIS was an action in which the plaintiff sought to recover damages from the defendants for wrongfully preventing the plaintiff from building and completing a certain wharf pursuant to a contract contained in a letter addressed by the plaintiff to the defendants, in the following terms:—

"I hereby engage and undertake to build your wharf at Millwall, as described to me, that is to say, 75 feet long from Messrs. Swayne & Bovill's, taking the line as laid down, with the return end to the present footpath, and to provide at my own cost and expense the necessary materials and other things for the said purpose, as per the specification at foot, and finish the same in a substantial and workman-like manner, and to your satisfaction, for the sum of 200*l.*; to be paid by three several amounts, that is to say, one-third when the work is half completed, the second third when quite finished, and the last remaining sum three months from the day of finishing the same:

"The said wharf to be built with materials as follows:

"15 front piles 28 to 30 feet long, and not less than 12 inches square.

"15 land tie-piles 15 to 20 feet long.

"22 two-inch iron tie-rods 20 feet long, topped and headed.

"The front planking to be three-inch deals, spiked to the piles.

"The top to be finished off with a campshore 6 by 12, well and securely bolted and tied down.

"The whole to be fitted in level with the footpath and campshore."

*The contract was entered into on the 27th of March, 1856. [*388] On or about the 23d of May, the defendants, being dissatisfied with the manner in which the work was proceeding, stopped it, and refused to allow the plaintiff to complete it.

This action was commenced on the 9th of July. On the 26th, the following particulars of the plaintiff's demand under the common counts were delivered pursuant to a judge's order.

	£	s.	d.
'To 850 feet of piling, 12 in. by 12 in.	59	10	0
105 feet for campshore, 12 in. by 6 in.	5	5	0
Smith's work making land-ties, nuts, screws, heading-bolts, &c., for campshore plates outside and in, spikes, planking, &c.	28	7	0
Pile-driving	30	16	0
40 pile-shoes	10	0	0
Barge-hire, towing timber, rafting ditto, and attending	3	19	2
2080 feet three-inch plank	60	13	4
Carpenters shoeing piles, planking, cutting piles, and fitting campshore, putting in land-tie bolts, heading piles, &c., 73 days, 4 hours	22	2	0
Labourers for removing stone and digging out for plank	8	2	2
	<hr/> £228 14 8 <hr/>		

Issue was joined on the 3d of November last, and notice of trial given for the sittings after Michaelmas Term. The cause was called on on the 28th of November, but, the plaintiff's witnesses not being in attendance, the record was withdrawn; and, on the following day, the plaintiff caused the defendants to be served with a demand [*389] and notice in bankruptcy, under the 78th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), setting out the particulars as above, giving them credit for two payments of 30l. and 36l. 13s. 4d. respectively, and allowing a set-off of 6l. and demanding immediate payment of the balance, 156l. 1s. 4d.

On the 10th of December, the plaintiff made and filed in the Court of Bankruptcy an affidavit in which he swore that the defendants were justly and truly indebted to him in the sum of 156l. 1s. 4d. "for work, labour, and materials supplied by him to the defendants at their request, for money found to be due from the defendants to the plaintiff on accounts stated between them, and for money paid by the plaintiff for the defendants at their request;" and a summons was thereupon issued against the defendants. This summons was heard before Mr. Commis-

gioner Fonblanque on the 17th of December, and was by him adjourned to the 20th, for the defendants to file an affidavit that they had a good defence to the action, and that they were solvent. The required affidavit having been produced, the summons was discharged.

The cause was tried on the 23d of January last, before Willes, J., when (the special count having been abandoned) a verdict was found for the plaintiff on the common counts for 75*l.* 11*s.* 8*d.*,—the jury explaining their verdict by saying that they gave the plaintiff credit for 200*l.* as due to him on the contract, and deducted therefrom the sums following, viz. 72*l.* 13*s.* 4*d.*, being the amount of the payments made and set-off claimed by the defendants, and for which the plaintiff had given credit in the demand in bankruptcy; 40*l.*, as the amount required to finish the wharf, according to one Bracebridge, a witness called for the *390] plaintiff (the plaintiff himself, on *his examination, having admitted that it would have cost him 25*l.* to complete the work); 10*l.* for a deficiency in the size of the tie-rods; and 1*l.* 15*s.* for a deficiency in the length of the wharf,—making together 124*l.* 8*s.* 4*d.*

Upon an affidavit setting out the above facts, and also stating that the summons in bankruptcy was issued against the defendants vexatiously and in order to harass and annoy them, and without any reasonable or probable cause as to the amount of alleged debt deposed to by the plaintiff in his affidavit, and that the several items in the particulars of demand referred to the work done and materials supplied for and towards the erection of the wharf, and to no other work or materials,

Hugh Hill, Q. C., in Hilary Term last, obtained a rule calling upon the plaintiff to show cause why the defendants should not be allowed their costs of the action, and of the application, and why the plaintiff should not be disabled from taking out execution for the sum recovered in this action unless the same should exceed (and then only for such excess) the amount of the defendants' said costs when taxed, and why, in case the said sum recovered by the plaintiff should be less than the defendants' said costs, the defendants should not be at liberty to issue execution for the difference.

The motion was founded upon the 86th section of the 12 & 13 Vict. c. 106, which enacts, that, "in every action brought after the commencement of this act, wherein any such creditor is plaintiff and any such trader is defendant, and wherein the plaintiff shall not recover the full amount of the sum for which he shall have filed an affidavit of debt as aforesaid, such defendant shall be entitled to costs of suit, to be taxed according to the custom of the court in which such action shall have *391] been brought, provided that it shall be made appear to the *satisfaction of the court in which such action is brought, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff in such action had not any reasonable or probable cause for making such affidavit of debt in such amount as afore-

mid, and provided such court shall thereupon, by rule or order, direct that such costs shall be allowed to the defendant; and the plaintiff shall, upon such rule or order being made, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed (and then in such sum only as the same shall exceed) the amount of the taxed costs of the defendant in such action; and, in case the sum recovered in any such action shall be less than the amount of the costs to be taxed as aforesaid of the defendant, then the defendant shall be entitled, after deducting the sum of money recovered by the plaintiff in such action from the amount of his costs so to be taxed, to take out execution for such costs, in like manner as a defendant may now by law have execution for costs in other cases."

Knowles, Q. C., and *Hannen*, now showed cause, upon an affidavit of the plaintiff, in which he stated, amongst other things, that the sum of 156*l.* 13*s.* 4*d.* claimed by him from the defendants in his affidavit of debt in bankruptcy was the amount he then believed the defendants to be truly indebted to him, and which he obtained by deducting from the value of the work and materials supplied by him to the defendants all counter-claims then existing against him in relation to the same transaction or otherwise; and that the difference of 80*l.* 9*s.* 8*d.* between the amount of the said verdict and the balance claimed in his said affidavit of debt, arose partly from deductions mentioned in the affidavit upon which this motion was founded, viz. the deduction of 40*l.* for the sum required to complete the wharf, as stated by the *witness *Bracebridge*, instead of 25*l.*, the amount stated by the plaintiff himself, all the materials necessary for completing the wharf having been delivered on the defendants' premises (with which fact *Bracebridge* was not acquainted at the time of the trial), the item of 10*l.* allowed to the defendants for difference in price of the tie-rods under circumstances which were mentioned,^(a) and the item of 1*l.* 15*s.* for unavoidable deficiency of a few inches in the length of the wharf, making together deductions amounting to 26*l.* 15*s.*, to which at the time of making his said affidavit of debt he considered himself reasonably entitled, and therefore made no deduction; and that the remainder of the sum of 80*l.* 9*s.* 8*d.* was the difference between the price of the work as contract work and the actual value of it,—in confirmation of which latter statement, he referred to the evidence of one of the defendants' witnesses, a wharf-builder, who at the trial proved the inadequacy of the contract price. They also produced the affidavits of a civil engineer and a surveyor and architect as to the reasonableness of the charges contained in the particulars of demand.

The question here is, not whether the defendants really were indebted

(a) The plaintiff, in his affidavit (which was uncontradicted in this respect), stated, that, although the contract stipulated for tie-rods of the thickness of two inches, it was understood and agreed that the rods used were to be like a sample produced by one of the defendants at the time, and which was of the substance of one inch and three-eighths only.

to the plaintiff in the amount sworn to, but whether the plaintiff had reasonable or probable cause for thinking that he was justly entitled to the sum for which the affidavit was made,—what was the state of his own mind upon the subject at the time of making the affidavit. The defendants having prevented him from performing the work under the *393] contract, the plaintiff was not limited to the contract price, *but was justified in considering himself entitled to measure and value. [CRESSWELL, J.—The plaintiff must show that he had reasonable ground for believing that he was entitled to the sum claimed in his affidavit.] The cases upon the 43 G. 3, c. 46, s. 3, are analogous. In *Sherwood v. Taylor*, 6 Bingh. 280 (E. C. L. R. vol. 19), 3 M. & P. 641, the defendant was arrested for 327*l.*; he tendered 250*l.*, but did not pay it into court. An arbitrator to whom the cause was referred awarded the plaintiff only 250*l.*; and it was held not a case to entitle the defendant to costs as for a malicious and vexatious arrest. The principle which governs these cases is there laid down by Tindal, C. J., thus,—“The statute 43 G. 3 directs that the defendant shall be allowed his costs when he is arrested for a larger sum than is found to be due, provided it shall appear to the court that there was not any reasonable or probable cause for such arrest. It has been contended, that, if under all the circumstances of the case it was unreasonable in the plaintiff to arrest the defendant, the latter is entitled to his costs; but the construction which has been put on the statute, is, that the defendant is only entitled to them if the plaintiff holds him to bail for a sum materially larger than that which is found to be due; and the labouring car is thrown on the defendant to show that so much was not due. The object of the statute was, to save the defendant the expense and inconvenience of an action for a malicious arrest, and the proof offered on applications such as the present must go to the same extent as the proof in such an action. Here, we do not see on the defendant's affidavit that there was not reasonable and probable cause for his arrest. On the contrary, he admits by his tender that 250*l.* was due; and he so far distrusted his own judgment as to the exact sum, that he abstained from paying into court the amount tendered. If the defendant conceived he *394] should not be safe in paying in 250*l.*, why *should not the plaintiff seek to recover more? The argument that the arrest was without probable cause, because the defendant by his tender showed himself solvent to a sufficient amount, proves too much. According to that, the statute would give every defendant his costs where the plaintiff arrested, and recovered after a tender; but the recovery of costs by defendants is confined to cases where the arrest is without probable cause.” [CRESSWELL, J.—To sustain an action for a malicious arrest, or an application under the 43 G. 3 for costs for maliciously holding the defendant to bail for an excessive amount, malice should be shown.] The language of the two statutes is substantially the same. The court

is not bound by the verdict of the jury: *Gilbert v. Crosier*, 1 C. B. N. S. 302. In that case, the plaintiff made an affidavit in bankruptcy alleging the defendant to be indebted to him in the sum of 63*l.* 6*s.*: at the trial the jury returned a verdict for him for 10*l.*, in addition to 37*l.* 10*s.* paid into court on a plea of tender: the judge who tried the cause reporting that he was of opinion there was evidence to show that the plaintiff was fairly entitled to recover the whole amount,—the court held that the case was not one for costs under this section.

Hugh Hill, Q. C., and *Needham*, in support of the rule, were stopped by the court.

COCKBURN, C. J.—I am of opinion that this rule should be made absolute. I am not satisfied that the plaintiff had any reasonable or probable cause for making the affidavit to the amount he did. When a creditor has recourse to the extraordinary remedy given by the 78th section of the bankrupt act, he does it at the peril of the consequences if there is not a debt justly due to him to the amount deposed to. We may assume, that, when the defendants put an end to the contract, the plaintiff honestly believed that he was absolved from the contract price; but it by no means follows that he was justified in believing that he had reasonable or probable cause for swearing to a debt to the amount of 156*l.* 13*s.* 4*d.* It is admitted that the plaintiff was not performing the work in accordance with the terms of the contract, and therefore the defendants had a right to prevent him from going on with it. The plaintiff had a right to sue for the work done by him towards the performance of the contract, but he had no right to assume that he was absolved from the terms of the contract. If he had taken advice upon the subject, or if he had fairly brought the whole of the facts before the Court of Bankruptcy, the consequences might have been different. But, instead of adopting the only course that any prudent man would have adopted, he, without any advice to sanction his proceeding, made an affidavit which the circumstances did not warrant. He must take the consequences. [*395]

CRESSWELL, J.—I am of the same opinion. The plaintiff has thought fit to make an affidavit in the Court of Bankruptcy, alleging that the defendants were justly and truly indebted to him in the sum of 156*l.* 1*s.* 4*d.* for work, labour, and materials supplied by him to the defendants at their request, for money found to be due from the defendants to the plaintiff on accounts stated between them, and for money paid by the plaintiff for the defendants at their request. It appears to me that there was no pretence for saying that the defendants were indebted to the plaintiff in any such sum. No work was done by the plaintiff at the defendants' request, except under the contract; and the plaintiff had no right to suppose, that, because he was prevented from proceeding with the work, the contract was cast adrift altogether, and he was

*396] entitled to claim for *part of the work more than he had contracted to do the whole for. When the very stringent nature of the proceeding under these provisions is looked at, I think it is incumbent on the party availing himself of them to be very careful.

CROWDER, J.—I am of the same opinion. * In considering these cases, we must not disregard the verdict, though we are not bound by it. Here, the jury have found that the plaintiff was entitled to an amount considerably less than that sworn to. Parties who seek to enforce payment of debts by a process so stringent should be exceedingly cautious not to exaggerate their claims: and I think, that, in considering whether or not there is reasonable or probable cause, we ought to look, not so much at what may have been the motive operating on the man's mind, as at the surrounding circumstances and the law as applicable to them. It seems to me that there is no pretence for saying that the plaintiff had any reasonable ground for acting as he did.

WILLES, J.—I am of the same opinion. By the terms of the contract, the plaintiff was to be paid 200*l.* if he performed it fully. The utmost, therefore, that he could have recovered if he had performed his duty perfectly would have been 200*l.* He failed to perform it in several particulars. He might, however, be forgiven for supposing that he had sufficiently performed his contract so far as the tie-rods were concerned. But there is another defect of a still more serious nature: he fell short in the performance of his contract by 25*l.* according to his own account, and by 40*l.* according to the evidence of his own witness. The utmost he could recover, therefore,—assuming that he was entitled to recover for a wrongful dismissal,—would be, 165*l.*, and such profit as he could *397] have made by completing the *work under the contract; and that could not in any event exceed 190*l.* Any person making out a fair bill would not have claimed more than that sum. But the plaintiff sent in a bill for 228*l.* The plaintiff has thought proper to pledge his oath, and by the stringency of the proceedings under the bankrupt act has sought to compel the defendants to pay him a sum which he must or ought to have known he was not entitled to. I therefore think it is a clear case within the 86th section. Having thus improvidently sought to avail himself of the statute in a case to which it was not fairly applicable, the plaintiff must bear the penalty imposed by that section.

Rule absolute.

EDWARDS and Others v. THE KILKENNY AND GREAT SOUTHERN AND WESTERN RAILWAY COMPANY.

May 6.

The court refused to suspend or enlarge a rule for a *scil. fa.* against a shareholder in a railway company, upon a suggestion that the claim in respect of which the judgment against the company was obtained was founded upon an attorney's bill contracted by them in the prosecution of matters altogether *ultra vires*.

LUSH, on a former day in this term, obtained a rule calling upon James Butterworth to show cause why a writ or writs of *scire facias* on the judgment obtained by the plaintiffs in this cause should not be issued forth against him as a shareholder of the Kilkenny and Great Southern and Western Railway Company, to enable the plaintiffs to have execution upon the said judgment to satisfy the plaintiffs the sum of 4417*l.* 3*s.* 10*d.*, the debt and costs recovered by the said judgment and still unpaid, to the extent of the said James Butterworth's shares in the capital of the said company not paid up, pursuant to the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16. The affidavits upon which the motion was founded, stated that the company were indebted to the plaintiffs for work and labour as solicitors *for business [*398 done by them for the company from the year 1847 to the 31st of October, 1854; that the company was incorporated by an act of 9 & 10 Vict. c. cccix. (which act incorporated the Companies Clauses Consolidation Act, 1845), and that final judgment was signed against the company on the 18th of December, 1854, for 4413*l.* 15*s.* 10*d.* debt, and 3*l.* 8*s.* costs; that a sum of 275*l.* had been received by the plaintiffs since the judgment was recovered, and that the company were justly indebted to the plaintiffs in the sum of 4138*l.* 15*s.* 10*d.* for debt, and 3*l.* 8*s.* for costs; that a *fi. fa.* was issued upon the judgment, and returned *nulla bona*; that the defendants had not at the time of the judgment, or at any time since, or now, any lands, chattels, goods, or effects in England or Ireland whereon the plaintiffs could levy the amount of the said judgment, or any part thereof; and that due notice of this application was personally served on the 18th of February last. There was also an affidavit of the secretary of the company which stated that the company had not nor ever had any lands, chattels, goods, or effects either in England, or Ireland, whereon the plaintiffs could levy the amount of the judgment, or any part thereof; that Mr. Butterworth was a shareholder of the company, and that his name was on the sealed register of shareholders for the years 1848 and 1854, as the holder of twenty shares of the value of 20*l.* each, upon which the sum of 1*l.* 10*s.* each share had been paid; that two calls of 10*s.* upon each of the said shares had been paid, and one call of 10*s.* upon each of the said shares was now due; and that the said shares had never been transferred, and the same were still standing in the name of Mr. Butterworth in the sealed registered share list.

Millward, for Butterworth, applied for an enlargement of the rule *399] in order to enable him to make inquiries as to the circumstances under which the debt was contracted. The application was supported by an affidavit alleging that the plaintiffs' bill was contracted in the prosecution by the company of matters which were altogether *ultra vires*, in abortive attempts to obtain the sanction of parliament thereto, and in the defence of proceedings against shareholders. [COCKBURN, C. J.—Does your affidavit show that you have reasonable ground for believing that you will obtain the information required?] It does.(a)

(a) The affidavit was that of Mr. Butterworth, which stated, that, in or about the year 1846, in consequence of seeing a prospectus of a projected railway called The Galway and Kilkenny Railway, he applied for shares in the undertaking, and twenty shares were allotted to him accordingly: that, according to such prospectus, the proposed railway was to connect the towns or places of Galway, Ballinasloe, Cuddagh, and Kilkenny, and to be in the whole about ninety-six miles in length, and the capital was to consist of 1,000,000*l.*, divided into 40,000 shares of 25*l.* each: that, subsequently to the issuing of such prospectus, and the allotment to him of the said shares, the directors of the proposed company abandoned the greater part of the said projected railway, and confined the same to a line from Kilkenny to Cuddagh, a distance of twenty-six miles only, and that the proposed capital of the said company was at the same time reduced to 225,000*l.*, divided into 11,250 shares of 20*l.* each, and the title of the company changed from The Galway and Kilkenny Railway Company to the Kilkenny and Great Southern and Western Railway Company: that an act of parliament was obtained for the said railway, as thus altered, in the session of 1846, and received the royal assent on the 7th of August in that year: that no steps were, as deponent was informed and believed, taken after the passing of the act towards making the proposed railway, the company having, as deponent was informed and believed, no funds, and their affairs being in a very embarrassed state, and the powers for taking land and constructing the works, which had been extended for two years by the railway commissioners, finally expired, the former in 1851, and the latter in 1855: that, in 1848, the deponent was served with a writ for a call of 10*l.* per share, which had been made upon the shareholders of the company in February, 1848, for meeting the expenses incurred and then due and owing from the company, the amount of which call was remitted by his solicitor to Messrs. Edwards & Radcliffe, the solicitors of the company, in November, 1848: that, in June, 1850, deponent received an application from Messrs. Atkinson & Pilgrim, solicitors, for a second call of 10*l.* per share on the twenty shares so allotted to him in the said company, and, to avoid the threatened legal proceedings for the recovery thereof, he paid such call, which Messrs. Atkinson & Pilgrim stated they had every reason to believe would be the last: that deponent never attended any meeting of the said company, or otherwise interfered in any way in its affairs, and, after payment of such last-mentioned call, he did not expect to hear more of the said company, and did not in fact do so until February last, when the notice thereafter mentioned was served upon him: that he was totally ignorant of all proceedings of the company, save that nothing was being done towards the carrying out of the scheme, and was ignorant of the way in which the capital and shares were being dealt with, and he paid the said calls in such ignorance; but that he had lately been informed, and believed, that, in the year 1853, notwithstanding the position of the company and the insolvent condition of its affairs, and, as deponent believed, without the knowledge, assent, and concurrence of the body of persons who had subscribed *bonâ fide* to the original undertaking, a bill was introduced into parliament seeking to revive the compulsory powers contained in the act of 1846 for purchasing lands, and to extend the time limited for the completion of the line authorized by such act; and that, in the year 1854, there was also introduced a bill seeking, in addition to such last-mentioned objects, powers to abandon part of the old line, and to make a new line and certain branch lines of railway; but that, owing to the strong opposition of shareholders and others, the first bill, after passing the House of Commons, was thrown out in the Lords, and the second, after being introduced, was withdrawn: that such applications to parliament were conducted, as deponent believed, by the present plaintiffs, the solicitors of the company, who were in fact also, as he was informed and believed, the chief promoters of the original undertaking or project, and were shareholders in the company, and they and the secretary and engineers really were the acting persons in the affairs of the company, and were the persons by whom and for whose benefit the said applications to parliament were made: that deponent was no party to those proceedings, and never sanctioned or approved thereof, or indeed heard thereof

Lush, contra.—There is no pretence for enlarging the *rule: [400]
 the creditor has under the statute an absolute right to execution.
 The language of s. 36 is imperative,—*“ If any execution, either [401]
 at law or in equity, shall have been issued against the property
 or effects of the *company, and if there cannot be found suffi- [402]
 cient whereon to levy such execution, then such execution may
 be issued *against any of the shareholders, to the extent of [403]
 their shares respectively in the capital of the company not then

until lately, nor, he believed, did the body of bona fide subscribers to the original undertaking know of such proceedings or sanction them: and deponent was informed and verily believed that the plaintiffs' bill of costs, on which the judgment thereafter mentioned was founded, was incurred in the prosecution of those proceedings, which, as he had before stated, as he was informed and verily believed, were against the wishes of the general body of shareholders, and in opposing proceedings against an individual shareholder, and no part thereof was for business done relative to the concerns of the company: that the plaintiffs, in December, 1854, then being the solicitors of and the persons managing the affairs of the company, recovered judgment against the company for upwards of 4000*l.* alleged to be due to them from the company for such matters as aforesaid, and, as deponent was informed and believed, judgment was afterwards signed by default, there being then no board of directors or acting directors independent of the plaintiffs, or any one really to represent or protect the company or the shareholders therein: that, at the time the plaintiffs issued the said writ and signed the said judgment, they were in fact and to all intents and purposes the company, and they and their friends alone represented or knew anything of the affairs of the said company: that deponent had been informed, and believed, that there was very great doubt whether at the time of the commencement of the said action there was any duly appointed secretary or other officer of the company on whom process could properly be served: that, although, as deponent believed, it was alleged that the plaintiffs caused their bill of costs to be examined by one of the masters of the court of Exchequer, yet that such examination or taxation was not attended by any person on behalf of the company or the shareholders therein, and that the taxing masters of the court of Chancery were the proper authorities to tax the said bills: that the plaintiffs subsequently gave notice of their intention to proceed upon their judgment against certain shareholders of the company, but such shareholders, who, as he was informed and believed, were already in litigation in Chancery with regard to the affairs of the company and the favoured withdrawal of the shares allotted to certain of the directors, did, as he was informed and believed, resist the claim, and obtained an injunction from Vice-Chancellor Wood against the plaintiffs, to restrain proceedings, on various grounds, and, amongst others, that the judgment was obtained collusively; and that he was informed and believed that such proceedings in Chancery had been settled on terms most favourable to the shareholders the plaintiffs therein: that the plaintiffs were now making another attempt to render the judgment so recovered by them as aforesaid available against the deponent and other shareholders of the company, and on the 18th of February last, he was served with a notice of an intended application for a rule to show cause why a *scire facias* should not be issued against him as a shareholder of the company upon the judgment or so much thereof as the amount unpaid on the shares held by him in the said company extended to, and a rule nisi was accordingly moved for and obtained on the 21st of April last pursuant to such notice, which was served on the deponent on the 23d of April last: that the deponent was advised, that, in order to his protection and effectual defence, it might be necessary to file a bill or take other proceedings to set aside the judgment so as he was advised and believed collusively obtained by the plaintiffs as aforesaid, and that it might also be advisable for him to apply to have the plaintiffs' said bill taxed, without prejudice to his liability thereto, and that, at all events, the question of his liability or non-liability thereto under the circumstances before stated, and the course to be taken for his effectual defence, was one of considerable difficulty, involving in its determination much more inquiry, investigation, and attention than with a due regard to the deponent's interests could be given to it within the limited time allowed, if the rule was to be argued during the present term; and that, if further time was allowed to deponent to investigate the facts of the case, which were for the most part in the knowledge of the plaintiffs and those acting with them, and of which there was great difficulty in obtaining accurate information and evidence, he believed such facts would show that he had a defence to the plaintiffs' demand against him, on the merits: and that deponent had ample means to meet the plaintiffs' demands, if they should ultimately recover against him; and that the application (to enlarge the rule) was made bona fide, and not for the purpose of delay, save to enable him to obtain information and advice, as before stated.

paid up: provided always, that no such execution shall issue against any shareholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and upon such motion such court may order execution to issue accordingly." The court is asked to stay the plaintiffs' proceedings, in order to give the shareholder time to make an application to the Court of Chancery. What power has the court to grant any such indulgence? [WILLES, J.—The Court of Queen's Bench have granted this in a case not falling within the principle of *Philipson v. The Earl of Egremont*, 6 Q. B. 587 (E. C. L. R. vol. 51).] All the cases were reviewed in this court in *Morisse v. Harding*, 1 C. B. N. S. 67, where it was expressly held that the execution against a shareholder under the Joint Stock Bank Act, 7 & 8 Vict. c. 113, ss. 10, 13, was matter of right, the conditions imposed by the statute having been complied with. [WILLES, J.—That proceeded upon the assumption that *404] the judgment was a valid judgment. COCKBURN, *C. J.—Where it is suggested that a judgment has been improperly obtained against the company, with a view to fix the shareholders, the court ought not to be called upon to act ministerially, without allowing time for inquiry.] The judgment was signed in December, 1854: the shareholder, therefore, has had abundant time for impeaching it. [COCKBURN, C. J.—He would have no interest in impeaching it until the plaintiffs sought to enforce it against him.] Notice of this application was served upon the party on the 18th of February last; and this rule was not moved until the 21st of April. [CRESSWELL, J.—Before he could be heard to impeach the judgment, he would have to come and say that he was a shareholder. He now comes to show grounds for disputing that fact.] If this application be successful, every shareholder will come and ask for time, upon an insinuation that the judgment against the company has been fraudulently and collusively obtained. It is to be borne in mind that this rule does not ask for execution, but merely for a scire facias: and, if the shareholder has any answer, he may plead it.

Milward.—The facts here intended to be relied on could not be pleaded to the scire facias. [WILLES, J.—*Philipson v. Lord Egremont*, 6 Q. B. 587, and *Bosanquet v. Graham*, 6 Q. B. 601, n., show that it would be a good plea to the scire facias, to set forth facts showing the judgment obtained against the company to be void. And that doctrine is upheld by the House of Lords in *Shedden v. Patrick*, 1 Macqueen's H. L. C. 635.] In *Philipson v. Lord Egremont*, the judgment was bad as against the company itself. Where the obtaining of the judgment is a fraud upon the court, it may be pleaded: but that which is suggested here, viz. that there has been a fraud as against the shareholders only, is not pleadable.

*COCKBURN, C. J.—I am of opinion that we cannot afford the shareholder the indulgence which he asks. If this had been an application for *execution* against him, the case might have been different. But, inasmuch as he may plead the matters suggested by way of answer on the *scire facias*, I see no reason why the rule should not be made absolute. [405]

The rest of the court concurring,

Rule absolute.(a)

(a) In *Shedden v. Patriek*, it was held, that, where a judgment has been obtained by fraud, and more especially by the collusion of both parties,—such judgment, although confirmed by the House of Lords, may, even in an inferior tribunal, be treated as a nullity. But the allegations of fraud and collusion must be specific, pointed, and relevant, otherwise they cannot be admitted to proof.

POWIS v. HARDING, Official Manager of THE ROYAL BRITISH BANK. April 28.

Upon a rule for execution against a shareholder of a joint stock bank, under the 7 & 8 Vict. c. 113, the question raised presenting some difficulty, the court declined to decide it upon motion, but directed a special case to be stated.

BRADLEY, on a former day in this term, obtained a rule calling upon Henry Butler and Charles Walton, executors of Charles Walton, to show cause why execution upon the judgment recovered by the plaintiff in this cause for the sum of 576*l.* 1*s.* 6*d.* should not be issued against the property and effects of the said Charles Walton, deceased, as a shareholder in the Royal British Bank, *in the hands of the said Henry Butler and Charles Walton as his executors, to satisfy [406] the plaintiff in the sum of 180*l.* 13*s.* 8*d.*, the balance remaining due in respect of the said judgment, pursuant to the statute 7 & 8 Vict. c. 113, with costs.

Phipson showed cause, referring to the various sections of the statute 7 & 8 Vict. c. 113, and to the cases of *Ness v. Angas*, 3 Exch. 805, *Ness v. Armstrong*, 4 Exch. 21,† and *Fell v. Burchett*, 3 Jurist, N. S. 388, and contending that the 21st section did not, at all events, apply to the case of an executor. It appeared that the judgment was recovered against the bank after the death of the testator and before the executors had come in and proved the will.

COCKBURN, C. J.—The question raised here is far too important and difficult to decide upon motion. The better course will be to state the facts in the form of a special case, when it can be more solemnly argued and decided, and, if necessary, taken to a court of error.

The rest of the court concurring, the rule was drawn up as follows:—

“Upon reading, &c., it is ordered that a special case be stated between the said parties for the decision of this court, and that the same be set down for argument accordingly; and that the matters of

the said rule do depend upon the decision of this court upon the said special case."(a)

(a) The case now (Michaelmas Vacation, 1857) stands for argument.

***407] *FRY v. HARDING, Official Manager of THE ROYAL BRITISH BANK. May 6.**

Upon a rule for execution against a shareholder of a joint stock bank, under the 7 & 8 Vict. c. 113, the question raised presenting some difficulty, the court declined to decide it in a summary way, but directed that a *sci. fa.* should issue and a special case be stated.

BEASLEY, on a former day in this term, obtained a rule calling upon George Russell to show cause why execution upon the judgment recovered in this cause for 75*l.* 17*s.* 7*d.* debt, and 5*l.* 7*s.* 4*d.* for costs, should not be issued against the person, property, and effects of the said George Russell as a shareholder of the Royal British Bank, to satisfy the plaintiff in the said sums of, &c., pursuant to the 7 & 8 Vict. c. 113, with costs.

Milward showed cause, commenting upon the various sections of the statute 7 & 8 Vict. c. 113, and citing *Thompson v. The Universal Salvage Company*, 3 Exch. 310,† *Brettell v. Dawes*, 7 Exch. 307,† *King v. The Parental Endowment Assurance Company*, 11 Exch. 443,† *Hill v. The London and County Assurance Company*, 1 Hurlst. & N. 398,† *Nixon v. Brownlow*, 1 Hurlst. & N. 405,† *Henderson v. The Official Manager of the Royal British Bank*, 3 Jurist, N. S. 111, and *Baily v. The Universal Provident Life Association*, 3 Jurist, N. S. 269. The substantial question was, whether a shareholder who had regularly transferred his shares to a third person who had been duly registered as the holder of them in the books of the bank before the commencement of the action, but whose name still remained on the last-filed return, was liable to execution.

COCKBURN, C. J.—I feel very reluctant to decide a case of this sort upon motion. I think the better course will be to state a case.

***408] *CRESSWELL, J.**—The parties must so state the case as to try the real merits,—whether one who has sold and transferred his shares is liable as a shareholder, his name remaining upon the list returned to the stamp office.

WILLES, J.—The better course will be to issue a *scire facias*, to which the shareholder will appear, and then state a special case for the opinion of the court.

The rule was accordingly drawn up as follows:—

“That a writ of *scire facias* on the judgment obtained by the plaintiff in this cause for 75*l.* 17*s.* 7*d.* debt, and 5*l.* 7*s.* 4*d.* for costs, be

issued forth against the said George Russell as a shareholder of the said bank, to enable the plaintiff to have execution upon the said judgment to satisfy the plaintiff in the said sums of 75*l.* 17*s.* 7*d.* for debt, and 5*l.* 1*s.* 4*d.* costs, recovered by the said judgment, and still unpaid, and that the said George Russell do appear thereto; and that a special case be stated, &c., for the decision of this court, and that the same be set down for argument accordingly; and that the said rule, and the costs thereof, together with the costs of and occasioned by the application, do abide the event of the decision upon such special case."(a)

(a) The special case was argued in Michaelmas Term, 1857, and the court took time to consider their judgment.

A similar course was adopted in a case of *Edwards v. The Kilkenny and Great Southern and Western Railway Company*. Ex parte Butterfield; but the special case has not yet (Michaelmas Vacation, 1857) been set down. There, the party had executed the subscription contract as holder of twenty-five shares, for which he had scrip, in "The Galway and Kilkenny Railway Company;" but, on the change of the name and course of the projected railway, he declined to read in his scrip for registration, and had taken no step since.

*MEUX and Others v. LLOYD. May 5. [*409

Excessive and extortionate charges in a bill of costs as between attorney and client, form no ground for a summary application against the attorney, in the absence of evidence of wilful fraud,—the suitor being sufficiently protected by the taxation of the bill.
Nor is it any ground for calling upon the attorney to answer the matters, that he is unable to pay the amount found due from him to his client on such taxation.

PRIDEAUX, on a former day, obtained a rule calling upon A. B., one of the attorneys of this court, to show cause why he should not answer the matters contained in the affidavit. The ground of the application was, that defendant had employed the attorney to defend him in this action, and in other matters, upon the express understanding that he was to be charged only costs out of pocket, and that, in the event of his succeeding in the action, the attorney would refund any moneys which might be advanced by the defendant in the course of the proceedings; that the defendant having succeeded in the action, the attorney, having got the costs from the other side, sent in to the defendant a bill of costs as between attorney and client, containing very gross overcharges; that, upon an order to tax the bill,—the attorney denying the agreement alleged,—the master proceeded with the taxation, and made his allocatur in favour of the defendant for 57*l.* 7*s.* 8*d.*; that, on the 16th of January last, a judge's order (since made a rule of court) was made directing the attorney to pay to the defendant the sum of 67*l.* 5*s.* 4*d.*, that the defendant should be at liberty to sign judgment against him for that sum, with costs, and that the attorney should deliver up all deeds, &c., in his possession, custody, or power belonging to the defendant; that an execution had issued against the

attorney upon the judgment so signed, but that no fruits could be obtained, his goods having already been collusively taken in execution at the suit of another creditor; and that it was believed he kept out of the way to avoid being served with the allocatur.

*410] *Lusk* now showed cause upon an affidavit of the *attorney, admitting that he was indebted to the defendant in the amount stated and that he was unable to pay it, but denying that he had been guilty of any of the misconduct imputed to him, or of any wilful evasion of service of the allocatur and demand, as alleged. This is a vindictive and improper attempt to use the stringent process of the court for the purpose of enforcing a mere money demand. There has been no professional misconduct. The client has obtained an order to sign judgment, and has done so: he has not proceeded to execution, because he apprehends that it will be fruitless. That surely is no ground for such a proceeding as this.

Prideaux, in support of his rule.—The mere denial of the attorney is not enough. In the case of *In re Crossley*, 6 T. R. 701, it was held, that, if an attorney required to answer the matters of an affidavit, swear in his exculpation to an incredible story, the court will grant an attachment against him, though he positively deny the malpractices imputed to him. [COCKBURN, C. J.—How can we attach the man, when he has answered the charges? He admits the debt, but says he is unable to pay.] He does not venture to deny that he is keeping out of the way to avoid service of the allocatur and demand of payment.

COCKBURN, C. J.—I am of opinion that this rule should be discharged. It was moved upon three grounds,—first, that an agreement was entered into between the attorney and the client that the former should pay back any advances he might receive during the progress of the proceedings, and that, in any event, he would charge the client only the costs out of pocket, and that that agreement has been violated,—secondly, that the bill of costs delivered by the attorney to his client contains overcharges so gross as to amount to fraud,—*411] thirdly, that the attorney has evaded service of the allocatur *and demand of payment by abruptly quitting the masters' office when the allocatur was made, and by keeping out of the way since, and that he has procured a sham execution to be levied upon his goods in order to frustrate the client's remedy by execution. The case has been completely answered by the affidavits as to the first and last grounds. With regard to the alleged exorbitant charges in the bill delivered, if that had been the only ground of complaint, the rule would not have been granted. The taxation is a sufficient protection to the suitor in that respect. I therefore think the rule should be discharged with costs. It is obviously important that officers of the court should be kept under wholesome control with reference to their conduct and dealings with their clients. But, on the other hand, it is equally

important that they should not be unduly prejudiced in their professional character by being brought before the court upon light grounds. As, however, it is admitted that the money is due, I think the costs of this application should be set off against the client's demand.

CRESSWELL, J.—I am entirely of the same opinion. An attorney is always amenable to the court, where he has been guilty of professional misconduct: but the court is equally bound to protect him against false and unfounded charges. This rule undoubtedly would not have been granted on the mere ground of the reduction of the bill on taxation, unless it could have been shown that the charges were so wilfully and outrageously excessive as to amount to *fraud*. Nor, I apprehend, would it have been granted merely on the ground of the attorney having quitted the masters' office before he could be served with the allocatur. The substantial grounds were, that the attorney had agreed to be content with taxed costs from the plaintiffs in the event of success, and with costs out of pocket in the event of failure, *and to return [*412 any moneys that might have been advanced to him for the purpose of the suit; and also that the attorney, for the purpose of defeating the client's remedy, had kept out of the way, and caused a sham execution to be levied on his goods. These grounds are completely answered, and therefore I agree with my Lord that the rule should be discharged, and with costs, to be set off as suggested.

CROWDER, J.—I will only add, that, as regards the alleged overcharges, the attorney seems to me to have given a reasonable excuse. I therefore think he has answered the whole application.

WILLES, J., concurred.

Rule discharged accordingly.

WOOTTON v. DAWKINS. April 18.

The plaintiff entered the defendant's garden at night, and without his permission, to search for a stray fowl, and whilst looking closely into some bushes, he came in contact with a wire, which caused something to explode with a loud noise, knocking him down and slightly injuring his face and eyes:—Held, that the defendant was not liable for this injury at common law, nor, in the absence of evidence that it was caused by a spring-gun or other engine "calculated to inflict grievous bodily harm," under the statute 7 & 8 G. 4, c. 12, s. 1.

THE declaration contained two counts,—the first, founded upon [*413 the statute 7 & 8 G. 4, c. 12, s. 1, (a) for *unlawfully setting a

(a) Which, reciting that "it is expedient to prohibit the setting of spring-guns and man-traps, and other engines calculated to destroy human life or inflict grievous bodily harm," enacts, "that, if any person shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, the person so setting or placing, or causing to be so set or placed such gun, trap, or engine as aforesaid, shall be guilty of a misdemeanour."

The 5th section excepts guns, &c., set from sunset to sunrise in a dwelling-house, for the protection of the same.

spring-gun or engine calculated to inflict grievous bodily harm,—the second, claiming damages generally in consequence of a personal injury sustained by the plaintiff through the wrongful act of the defendant.

The defendant pleaded not guilty.

The cause was tried before Wightman, J., at the last Spring Assizes at Leicester. The facts were these:—The plaintiff, having lost a bantam fowl, and believing it to have strayed into the defendant's garden, obtained permission (during daylight) to go into the garden to search for it. Not finding it upon that occasion, the plaintiff went again (without permission, but getting over the wall with the aid of a ladder) about 9 o'clock at night, and proceeded to search for it among some bushes. While so engaged, with his head near the ground, the plaintiff came in contact with a wire which caused a loud explosion, whereby the plaintiff was knocked down and slightly injured in his face and eyes. There was no evidence to show what was the nature of the engine or of the substance which caused the explosion.

On the part of the defendant, it was objected that there was no evidence that the injury complained of was occasioned by a spring-gun or other engine calculated to destroy human life or to inflict grievous bodily harm, or that it was caused otherwise than by the plaintiff's own carelessness: and the case of *Jordin v. Crump*, 8 M. & W. 782,† was relied on.

For the plaintiff, *Bird v. Holbrook*, 4 Bingh. 628 (E. C. L. R. vol. 13), 1 M. & P. 607 (E. C. L. R. vol. 17), was cited.

*414] The learned judge yielding to the objection, nonsuited the plaintiff, reserving him leave to move to enter a verdict (for such damages as the learned judge, with the assent of the parties, should assess) for him, if the court should be of opinion that there was any evidence to go to the jury.

Mellor, Q. C., now moved accordingly.—He submitted that there was abundant evidence that the injury complained of was caused by a spring-gun or other engine, calculated, in the language of the statute, to inflict grievous bodily harm. He cited and observed upon *Bird v. Holbrook*, 4 Bingh. 628, 1 M. & P. 609, *Jordin v. Crump*, 8 M. & W. 782,† and *Barnes v. Ward*, 9 C. B. 392 (E. C. L. R. vol. 67). He stated that he had by mistake moved for a rule in the Court of Queen's Bench, but had failed to obtain it, that court thinking, that, to entitle the plaintiff to recover under the statute, it was not enough that the instrument was one calculated to create alarm, but that it must be calculated to destroy human life or to inflict grievous bodily harm, of which there was no evidence, and that there was no cause of action at common law.

PER CURIAM.—We think the conclusion the Court of Queen's Bench came to was quite correct, and, for the same reasons, we decline also to grant a rule.

Rule refused.

*SIR G. E. HODGKINSON, Knt., v. FERNIE and Another. [*415
April 28.

Scable, that the owner of a transport hired by government for the purpose of assisting in a war-like expedition, is not responsible for damage done to another transport forming part of the same expedition, where such damage results from the master's obedience to orders of the officer under whose immediate command he sails.

A. and B. were respectively owners of vessels which with many others were taken up by government for the conveyance of troops upon an expedition of war in the Black Sea: the transports were towed by steamers to their destination, each steamer having attached to her two transports, the masters of which were under her immediate order and control: the commander of the steamer to which B.'s vessel and another were attached, on reaching the anchoring ground in the evening, having dropped his anchor, desired the masters of his tows to hold on by their warps or hawsers; but, in the course of the night, a storm arose which caused B.'s vessel to swing with violence against A.'s vessel, whereby it was considerably damaged. In an action for the damage so caused, the learned judge who tried the cause told the jury that B. would not be responsible if the injury complained of resulted from a strict obedience on the part of the master to the orders of the officer in command of the steamer; but that, assuming that the master was justified by the orders he received in abstaining from anchoring in the first instance, it was for them to consider whether he had not been guilty of negligence and want of good seamanship in continuing to hold on by his warp under the altered state of circumstances,—there being some evidence to show that the accident might have been averted if he had dropped his anchor when the storm came on:—Held, no misdirection.

THIS was an action for an injury to a vessel belonging to the plaintiff through a collision with a vessel of the defendants.

The declaration stated that the defendants, by their servants, so negligently and unskilfully navigated and managed a ship of the defendants called the *Courier*, then being navigated and managed by their servants, that the said ship struck and came into collision with the plaintiff's ship the *Sultana*, by which the said last-mentioned ship was greatly and permanently damaged, and the plaintiff was put to and incurred great expense in repairing her, and was deprived of the use of her a long time, and thereby lost great profits which he would otherwise have made by her. Claim 1000*l*.

The defendants pleaded,—first, not guilty,—secondly, that the said ship was not at the time of the collision navigated and managed by the servants of the defendants, in manner and form as alleged. Issue thereon.

The cause was tried before Cockburn, C. J., at the sittings in London after Michaelmas Term, 1856. It appeared that the plaintiff's vessel, the *Sultana*, and the *defendants' vessel, the *Courier*, [*416 were both chartered by government, and formed part of a fleet of transports employed on the 9th of September, 1855, in the conveyance of troops on an expedition of war from Varna to Eupatoria, in the Black Sea; that the fleet consisted of forty-two sailing and twenty-one steam vessels, each of the latter having two of the former in tow and subject to her orders and control, the whole being under the superior orders of the admiral; that the fleet started in seven divisions, each consisting of six sailing vessels and three steamers; that the defendants' vessel, the *Courier*, and a vessel called the *Orient*, under the guidance

of a Queen's steamer called the *Fury*, commanded by Captain Chambers, formed the rearmost vessels of the light or northernmost division, and the plaintiff's vessel, the *Sultana*, together with the *Sir Robert Sale*, under the guidance of the *Hydaspes*, a hired steamer, commanded by her ordinary master, formed part of the third division; that the instructions issued to the fleet at starting, were, that, on arrival at the place where they were to anchor, the position of each division was to be at four cables' length from that next to it; that, when the fleet arrived within about twenty miles of Eupatoria, a signal was made from the flag-ship for the fleet to anchor, whereupon most of the vessels, the transports as well as the tugs, dropped their anchors; that the *Courier* and the *Orient*, in obedience to positive directions from the commander of the *Fury*, did not anchor, but held on by their warps or hawsers; that the *Hydaspes*, with the *Sir Robert Sale* and the *Sultana* in tow, anchored somewhat within the prescribed distance from the division next to it, the two latter vessels, by order of the master of the *Hydaspes*, dropping their anchors also; that, at the time the fleet so anchored, there was a light wind from the north and east, but that, in the course of the night, the wind freshened, changing to north-west, with a rather heavy *sea; and that, in consequence, the *Orient* and *Courier* *417] swinging by their hawsers, the latter came into collision with the *Sultana*, and caused her very considerable damage.

The rest of the facts, and the arguments urged on the one side and on the other, will be best collected from the summing up of the Lord Chief Justice, which was in substance as follows:—

After telling the jury that the questions for their consideration were, whether the damage complained of was the result of negligence on the part of those in charge of the *Courier*, and whether that vessel was the defendants', his lordship proceeded,—

Before we enter into the inquiry, it becomes important to ascertain how the disaster arose. Two theories are suggested on the part of the plaintiff. He says the *Fury* and the two vessels she had in tow (the *Orient* and the *Courier*) having to anchor for the night, the tug (the *Fury*) alone let go her anchor, the others holding on by their warps or hawsers; the consequence of which was, that, although the anchor of the tug held well enough whilst the weather remained tranquil, yet a breeze springing up, the strain upon the cable of the tug became too great, and she dragged her anchor, and, the position of the vessels becoming changed, the two vessels, the *Orient* and *Courier*, swinging to the *Fury*'s anchor, the latter vessel (the *Courier*) came into collision with the plaintiff's vessel, the *Sultana*. Setting aside all question of negligence, there is a difficulty in adopting this view of the case; for, you have the positive testimony of the captain, the lieutenant, and the master of the *Fury*, that she did not drag her anchor at all. Further, the plaintiff says, that, whether the *Fury* dragged her anchor or not,

when during the night the wind freshened, the effect was that the two transports, the *Orient* and *Courier*, being attached by their hawsers only to the tug, without *having anchors to steady them, oscillated or swung backwards and forwards like a pendulum, in obedience to the impulse of the wind, and thus the *Courier* came in contact with the *Sultana*, and occasioned the mischief. Probably, if you think you can with safety rely upon the evidence of the officers of the *Fury*,—inasmuch as the accident undoubtedly did happen from the *Courier* coming in contact with the *Sultana*,—you may be disposed to adopt the latter of these theories. [*418]

That brings us to the question whether or not that which was the immediate cause of the mischief did result from want of seamanship, or, in other words, from negligence, on the part of those who were navigating the *Courier*. And here again the case for the plaintiff divides itself into two separate parts. In the first place, it is said that the *Courier* and the *Orient* ought to have anchored when the *Fury* anchored, the signals from the leading ship,—first, that the vessels should prepare to anchor, and afterwards that they should anchor in their respective stations according to the order of sailing,—being signals which the persons navigating the *Courier* were bound to obey. And I think it may be taken as a fact conceded on all hands, that, if the *Courier* and the *Orient* *had* anchored, the accident would not have occurred. It does not, however, follow, that, because the plaintiff has so sustained damage, he has sustained it wrongfully at the hands of the defendants so as to make them responsible: they are responsible only if that damage has been occasioned by their want of seamanship and of reasonable and proper care. In the second place, the plaintiff says, that, assuming that the persons having charge of the defendants' vessel were justified in abstaining from dropping her anchor when the *Fury* first took up her position, yet, when in the course of the night the breeze freshened, that which may have been justifiable in a perfectly tranquil state of the weather at the commencement of the *evening became unjustifiable and unseamanlike in the exigency [*419] which arose.

Now, as regards the first point, the defendants' answer is, that they were acting under the control of superior orders, and therefore are not responsible for the consequences. What are the facts? There can be no doubt that the signal made was a general signal, and not addressed solely to the steamers, though it appears to have been variously interpreted throughout the fleet. In some instances, the officer in command of the steamer conceived he had authority to prescribe to the vessels he had in tow whether they should let go their anchors or not. In others, the commander seems to have considered the signal as a general one, and accordingly ordered the transports to anchor. The commander of the *Fury* adopted the former construction of the signal, and directed

the persons in charge of the Orient and the Courier to hold on by their warps, and not to let go their anchors, but to have a small kedge ready to let go astern if necessary in order to prevent them from going too much ahead. Captain Chambers, who had the command of the Fury, states in his evidence, that he considered that the signal to anchor applied to all the vessels of the fleet who were acting independently, that is, vessels having control over themselves, which he considered vessels in tow had not; and that, as a matter of seamanship, it was safer for the vessels to hold on by their warps than to anchor: and he adds, that, supposing they had occasion to let go the kedge, they would stand in a calm or light wind, and have kept the tow ropes fast; and, if the breeze had freshened, they should have kept them fast as long as possible, and then seamanship would have dictated the rest. He further says, that, in his judgment, the proper thing to be done by the persons in command of the Orient and Courier, was, to hold on to the *420] Fury as long as possible, and to anchor *if they broke adrift: and, when he is asked whether, if it came on to blow, it would not have been prudent for the Orient and Courier to drop their anchors, he says,—“If it had come on to blow to such an extent as to have rendered it prudent for the Orient and Courier to anchor, I should have considered it right for the masters of those vessels to come to an anchor, of course letting me know if possible before doing so.” Thus, the three officers of the Fury, the captain, the lieutenant, and the master, agree that, in their opinion, the exigencies of the service required, that instead of letting go their anchors, the Orient and Courier should ride by their warps or hawsers, because they say, that, being off an enemy's coast, on an expedition of war, dispatch was of the utmost importance, and that, when the order for weighing anchor and sailing was given in the morning, considerable loss of time would have ensued if they had to wait until the vessels they were towing had detached themselves, weighed, and again attached themselves to the steamers. It is clear from the whole of the evidence that it never entered into the contemplation of these officers that the Orient and Courier should drop their anchors whilst attached to the Fury; and therefore it can hardly be said that there was negligence on the part of the commanders of the transports in omitting to do that which it never entered into the mind of the captain of the Fury to provide against. The first question, therefore, for you, is, whether the master of the Courier had orders from the commander of the Fury not to let go her anchor, but to hold on by her hawser. Whether that order was right or wrong in point of judgment and seamanship is a matter which, if the order was one that the master of the Courier was bound to obey, it is clear it was not a matter for him to form any judgment about. His duty was, to obey orders, and not to take upon himself to criticise them, and to act upon

his own judgment *as to their propriety and expediency. There would be an end to all subordination, military or naval, if the officer subordinate in command were to take upon himself to decide upon the merits of the order, before he obeyed it. [*421]

If you are satisfied that the order was given, then comes the second question,—was Captain Chambers in a position to give such order? or, in other words, was it an authority which the master of the Courier was bound to obey? Captain Baker, who was called as a witness for the plaintiff, and who was the commander of the Hydaspes, the steamer which had the plaintiff's vessel, the Sultana, in tow, says,—“Tows are always under the orders of the tug: the signal is made to the remainder of the fleet: they (the tows) would wait the orders of the officer commanding the tug.” And he adds, that, when they were at Varna, before sailing, the captain of the flag-ship met all the masters of the transports on board the Emperor, and told them that the vessels being towed were to obey the orders of the commanders of the respective tugs. Thus you have unimpeachable testimony, that, not only is it the general rule that tows are under the immediate orders of the commanders of the tugs to which they are attached, but that, in this case, a special order to the same effect was issued by the admiral. If, then, this was the relative position in which the master of the transport would stand to the captain of the tug, and the latter gave positive orders to the former not to anchor, but to hang on by her warp, what would have been the responsibility of the master of the Courier, he being for the purpose of that expedition in Her Majesty's service, if he had taken upon himself to disobey that precise and positive order? In what position would he have placed himself or his owners, if any consequences injurious to a third person or detrimental to the public service had resulted from his act?

*If, upon the evidence, you are of opinion that Captain Chambers had authority to give and did give the order I have stated, then I am bound to tell you, that, in my judgment, the defendants are not in point of law responsible for anything that happened whilst they were acting in obedience to the orders of their superior officers: and for this obvious reason. The plaintiff gives up his vessel for the purpose of this expedition to the service of the government, entering into a contract in which he of course takes care to stipulate for an amount of remuneration which will be a complete indemnity against the increased risk she will encounter beyond the perils she would have incurred if engaged in the ordinary merchant service. The vessel is employed on a warlike expedition; and it is necessarily incident to such an employment that everything so far as concerns the safety of ship and crew shall be made subservient to the purpose for which the expedition is undertaken. All this the owner knows when his ship is chartered: and he knows that she forms one of a fleet all of which are [*422]

in common with herself at the absolute disposal of the person in supreme command, and bound implicitly to obey all such orders as they may receive in furtherance of the common object. If, therefore, the defendants in this case, in doing that which they did, and from which damage is said to have resulted to the plaintiff, were acting in obedience to orders given to them by an authority which they were bound to obey, I take upon myself to tell you,—subject to correction hereafter if wrong,—that the defendants are not responsible.

But then comes the after part of the question,—did the defendants' servants, the master and crew of their vessel, act in an unseamanlike manner in not letting go their anchor when a state of circumstances arose different from that which existed when Captain Chambers gave *423] his orders to them to hang on by their hawsers? *Now, it was admitted by Captain Chambers and the other officers of the *Fury*, that if, by letting go the *Courier's* anchor, the collision with the *Sultana* might have been avoided, the master of the *Courier* ought if possible to have done so; for, that, although he was bound in the first instance to obey the order which he and the master of the *Orient* had received to hold on by their hawsers, yet that order was subject to a certain latitude of construction, and might properly have been departed from on a sudden emergency, such as a storm arising during the night, which might render it necessary to drop their anchors. Here we have a conflict of evidence upon which you will have to form your judgment. Captain Chambers and the other officers of the *Fury* have told you, that, in their judgment, it would have been better for the *Sultana* and the *Sir Robert Sale* to have held on by their hawsers to the *Hydaspes*, than to have cast anchor, as they did. On the other hand, it is clear that the masters of the *Sultana* and the *Sir Robert Sale* were as much bound to obey the orders of the commander of the *Hydaspes*, as were the masters of the *Courier* and *Orient* to obey those of the commander of the *Fury*. They had no alternative but to let go their anchors when ordered so to do. But then comes the question whether, in the first place, the mischief would have been prevented by the *Courier's* dropping her anchor, and, in the next place, whether, assuming it would, the *Courier* was in a situation to be able to do so. The officers of the *Fury* state, that, in their opinion, the letting go the anchor would not have prevented the collision, but in all probability would have aggravated it. The witnesses for the plaintiff, on the other hand, affirm that it would have prevented it. And we have this further fact,—about which there seems but little dispute,—that the *Courier's* decks were crowded with soldiers whose safety would have been grievously jeopardized by *424] letting go the anchor at that moment. You must choose between the conflicting views thus presented.

There is also a third view, which may not be altogether unworthy of your attention, viz. whether this was not one of those cases which, in

the helplessness of human intelligence, and the feebleness of human efforts struggling with the power of the elements, rather assumes the character of inevitable accident, which no one could avert, and for which no one is responsible.

In addition to what they urge upon this part of the case, the defendants further submit, that, even supposing that their servants were guilty of some want of seamanship and skill, the plaintiff, by his own negligence, or that of the commander of the *Hydaspes* under whose orders his vessel was, contributed to the mischief, by placing his vessel at a smaller distance from those forming the next division than was prescribed by the admiral's orders.^(a) Those orders directed that the several divisions of the fleet which formed the expedition should anchor four cables' lengths apart; whereas, the *Hydaspes* with the *Sultana* and *Sir Robert Sale* in tow, were, according to the plaintiff's witnesses, anchored within *two* cables' length, though some of the defendants' witnesses, and amongst them the officers of the *Fury*, estimated the distance at three and a half cables. Now, it may very well be that that half cable's length (assuming the *estimate of the defendants' [425 witnesses to be the more correct one) would have made all the difference. On the other hand, it is perfectly true that the *Sultana* was not responsible for the position which the *Hydaspes* took. Being in tow of the *Hydaspes*, when that vessel took up her position, that of the *Sultana* and the *Sir Robert Sale* was dependent upon hers. But it must be observed, that, when the *Sultana* dropped her anchor, she cast off her hawser, and then, being liberated from the *Hydaspes*, there was nothing to prevent her from taking up the position assigned to her by the regulations which had been issued.

It is further urged, on the part of the defendants, that the master of the *Sultana* did nothing to remove his vessel from the danger of a collision when that collision became imminent, and that possibly he might by letting out additional cable have swung clear of the *Courier*. Are you of opinion, upon the evidence before you, that it was incumbent on the master of the *Sultana* to take all such means as he had at his command to avert the impending peril? Was it, under the circumstances, his duty to let out additional cable? That Captain Chambers thought so, is clear; for he tells you, that, the moment he saw what was likely to take place, he sent an officer on board to direct the master to do so: and the master of the *Courier* had previously made the same request. The answer of the master of the *Sultana* was, "We have

(a) At common law, a party is not entitled to recover any damages for a collision, unless he himself has been wholly blameless. In the Admiralty Court, to entitle the plaintiff to recover the entire amount of damage he has sustained, he must in like manner prove himself to have been wholly blameless: but, if each vessel has by the negligence of the respective crews contributed to the injury, the practice is to add together the amount of damage done to each vessel, and adjudge each owner to pay half the aggregate amount. See Dr. Pratt's Essay on the Use of Ships' Lights, p. 4, n.

none on deck." Now, was it the duty of the master of the Sultana,—stationed in the midst of a fleet, in a sea peculiarly liable to sudden and violent storms, aware as he was (or ought to have been) that he was nearer to the adjoining division than the distance prescribed by the admiral's orders, aware (as he probably was) that the Orient and the Courier were not anchored, but merely attached to the Fury by their hawsers,—was it or was it not a matter of prudence, which, as an *426] ordinarily skilled seaman, he ought to have adopted, to have had on deck a sufficient quantity of cable to meet such an emergency? That is a matter for your consideration.

The question is, whether you think the defendants, by their servants, were guilty of negligence: and then comes the other question,—did the plaintiff contribute to the damage by his own negligence in improperly taking up his station within the prescribed distance, and in omitting to have recourse to those means which he had or ought to have had at his command in order to assist in averting the impending danger.

The whole case substantially comes to this:—The plaintiff complains that the defendants were guilty of negligence in not anchoring when the Courier was first brought into her position; and of further negligence in not letting go her anchor when in the course of the night a sudden emergency arose. As to the first, the defendants answer that they were not free agents, so as to be able to obey the dictates of their own judgment and experience, but were acting under orders which they were bound to obey,—orders emanating from an authority to which the plaintiff as well as themselves owed a common obedience; and therefore that they are not liable for the consequences resulting from their obedience to those orders. If you are of opinion that that is so, then, as I have already told you, I am of opinion that, in point of law, the defendants are not responsible. As regards the second point, viz. whether the defendants were not guilty of negligence in not letting go their anchor when the shift of wind occurred during the night,—having before you the theories of the witnesses (and of the counsel) on the one side and on the other, and looking at all the surrounding circumstances, you will say whether or not there was negligence on the part of the defendants resulting in the damage of which the plaintiff complains. If you think there was negligence on the defendants, *427] part sufficient to make them responsible for the damage sustained by the plaintiff, then you will consider whether or not the plaintiff by any negligence or misconduct on his part contributed to the accident, by omitting to do his best under the circumstances to prevent the mischief.

His lordship concluded by observing upon the evidence of ownership, which had been made a point in the case.

The jury returned a verdict for the plaintiff;(a) whereupon the Lord

(a) It was agreed that the damages should be referred to Mr. Richards, the average stater.

Chief Justice asked them "whether they were of opinion that there was negligence in one or both parts;" to which the foreman answered, "In one." His lordship again asked, "In the latter part?" *Foreman*: "Yes, on the defendants' part." *Lord Chief Justice*: "And you are of opinion that the ownership of the ship is sufficiently established?" *Foreman*: "We are."

Edwin James, Q. C. (for the defendants) then asked his Lordship to put it to the jury, *whether the defendants acted in obedience to orders.*

COCKBURN, C. J.—I understand them to have found that in your favour; *because they find that the negligence had reference to the second part.*(a)

Edwin James, Q. C., in Hilary Term last obtained a rule nisi for a new trial, on the grounds,—first, that the verdict was against the evidence,—secondly, that the defendants were acting in obedience to orders of Her Majesty's officers in command, and that the question was one which could not be properly entertained in a court of common law.

**Byles*, Serjt., and *Needham*, on a former day in this term, showed cause.—No reasonable ground of objection exists against [*428 the summing-up. The only question, therefore, is, whether the persons in command of the defendants' vessel, their own servants, were guilty of negligence in allowing the Courier to hang only by her hawser, instead of anchoring, in a place notoriously subject to such frequent and sudden and violent storms as the Black Sea. *Braddick v. Fletcher*, 2 N. R. 182, is a distinct authority to show that the owners under the circumstances are liable. There, the ship was chartered to the commissioners of the navy as an armed vessel, and an injury was done to another vessel through the misconduct of the master and crew, while a commander of the navy and a King's pilot were on board: and Sir J. Mansfield said: "The only ground on which it can be contended that the defendants are not liable, is, that, although a master and crew in the pay of the owners were in the possession of the ship, yet there was a superior officer on board, whose orders the master was bound to obey. This brings the case to this point, whether the owners, by taking a man on board belonging to those to whom they have let their ship, can thereby exonerate themselves from their responsibility. It appears to me that they cannot. The officer is taken on board by an agreement which the owners make. It is doubtful whether by obeying the orders of the officer,(b) it was meant that the officer should see to the navigation and direct the motion of the ship, or only direct to what place the ship should be carried for the purpose of being employed

(a) This not very intelligible "conversation" is from the short-hand notes.

(b) It was a stipulation in the charter-party, that "the master should strictly observe and execute all such orders and instructions as he should from time to time receive from the officer who should be appointed to command the vessel."

*429] against the enemy. The true justice *of the case, is, that, if an injury happens through the misconduct of the master and crew, the owners should be liable; but if by the misconduct of the officer, that the officer should be liable. But, how is a third person to ascertain the fact? There is a provision in the charter-party, that, if the injury does not happen by the fault of the master or crew, that the Crown shall make satisfaction;(a) and this is very reasonable between the Crown and the owners. Referring the adjustment of the damage to the true cause, they can inquire into the matter between themselves; but it is impossible for any third person, who receives damage, to inquire whether it arose from the act of the master and crew or of the officer. On the whole, it appears to the court that this ship, notwithstanding it had an officer on board, is, with regard to third persons, to be considered as the ship of the owners; and that they are, therefore, answerable for damage done by their ship." [WILLES, J.—As to British subjects, the circumstance of the ship being under the command of a British officer can make no difference in the defendants' position: they have voluntarily placed their ship in that predicament. CRESSWELL, J.—The alleged misdirection consists in my Lord's omitting to tell the jury that the matter could not be entertained in a court of law. COCKBURN, C. J.—The defendants insist that, the ship being in the Queen's service, the master and crew were not the master and crew of the owners, but of the Queen.] That is expressly opposed to the decision of this court in *Fletcher v. Braddick*.

Edward James, Q. C., and Quain, in support of the rule.—Both the plaintiff's vessel and that of the defendants, being in the service of the Crown on an expedition *of war, were subject to the orders of *430] the commander of the expedition, and liable to all the penalties of military or martial law for any disregard or disobedience of such orders: see *Prendergast on Military Law*: see also the Duke of Wellington's Dispatches, Vol. 6, p. 46, and the speech of Sir James Mackintosh in the House of Commons, in June, 1824, upon a motion respecting the trial of Missionary Smith,—*Hansard's Debates*, Vol. 11, pp. 146, 147: and no remedy by civil action can be maintained by the owners of the one against the owners of the other for any injury sustained in consequence of obedience to lawful commands. In *Barwis v. Keppel*, 2 Wils. 314,—which was an action by a sergeant against his commanding officer for wrongfully, unlawfully, and maliciously, and without reasonable cause, under the false pretence of misbehaviour on his part, reducing him to the ranks, whilst serving abroad,—the court say: "Flagrante bello, the common law has never interfered with the army: *Inter arma, silent leges*." [COCKBURN, C. J.—Suppose the commander of the expedition had ordered two or three of these trans-

(a) This had reference, not to damage done to any other vessel, but to damage done by the enemy to the vessel chartered.

ports to attack an armed vessel of the enemy, would their refusal to do so subject them to punishment by military law?] Probably it would. This general subjection to the officer in command is further exemplified by the case of *Boyce v. Bayliffe*, 1 Campb. 58, which was an action by a passenger on board a vessel on a voyage to Bombay, against the captain, for assault and false imprisonment, where Lord Ellenborough said: "A captain of a ship had authority to do what was necessary for the safety of those on board. On the approach of an enemy, he had a right to assign them all a station, which it was their duty to accept. As the plaintiff had refused to obey the orders given him, perhaps his confinement might be necessary to the discipline of the crew and the security of the vessel, and, if so, would be justifiable in law." So, here, the success of *the expedition might depend upon the strict obedience by the masters of the several transports to the orders [431 of its commander. [WILLES, J.—Lord Ellenborough, in the case last cited, is speaking of the general authority of the captain, which exists as well on board a merchant vessel as in a ship of war.] The observations of Lords Mansfield and Loughborough, in *Johnstone v. Sutton*, 1 T. R. 493, 510, 546, are also very much to the purpose here. That was an action against the commander of a fleet for maliciously and without reasonable or probable cause causing a captain to be tried by a court-martial, for alleged disobedience of orders, whereby the enemy escaped. "The flight," they say, "the signals, the attempt to pursue, the enemy sailing off, are all admitted by the declaration. That the orders were in fact not obeyed, seems to be admitted, too: for, the plaintiff only avers 'that he did not wilfully and willingly disobey:' but the sentence of the court-martial shows clearly that the orders were disobeyed, and that the plaintiff justified himself by physical impossibility to obey. Nothing less could be a justification. *A subordinate officer must not judge of the danger, propriety, expediency, or consequence of the order he receives: he must obey: nothing can excuse him but a physical impossibility.* A forlorn hope is devoted,—many gallant officers have been devoted. Fleets have been saved, and victories obtained, by ordering particular ships upon desperate services, with almost a certainty of death or capture. The question, then, tried by the court-martial, was, whether the plaintiff was justified in not obeying, by physical impossibility." After observing upon the facts, the learned judges conclude,— "Under all these circumstances, it being clear that the orders were given, heard, and understood; that in fact they were not obeyed; that, by not being obeyed, the enemy were enabled the better to sail off; that the defence was, an *impossibility to obey*,—a *most complicated point;—under all these circumstances, we have no difficulty to [432 give our opinion, that, in law, the commodore had a probable cause to bring the plaintiff to a fair and impartial trial." [COCKBURN, C. J.—There, the orders were given whilst the fleet was actually in action.]

No doubt. In *Forbes v. Cochrane*, 2 B. & C. 448, where certain persons who had been slaves in a foreign country where slavery was tolerated by law, escaped thence, and got on board a British ship of war on the high seas,—it was held that a British subject resident in that country, who claimed the slaves as his property, could not maintain an action against the commander of the ship, for harbouring the slaves after notice. At the end of his judgment, Holroyd, J., there says: “I have given my opinion upon this question, supposing that there would be a right of action against these defendants, if a wrong had actually been done by them: but I am by no means clear, that, even under such circumstances, any action would have been maintainable against them, *by reason of their particular situation as officers acting in discharge of a public duty, in a place flagrante bello.*” The case of *The Master of the Trinity House v. Clark*, 4 M. & Selw. 288, is also an authority to show that a vessel employed by government under circumstances like those under which the vessels in question were employed, are completely out of the possession and control of the owners, and in all respects subject to the orders of the commander of the expedition. [CRESSWELL, J.—I have reason to believe that that decision was not acted upon. I was for many years counsel for the Trinity House, and I think the masters of transports always paid light-dues afterwards.] The case of *Fletcher v. Braddick* is thus observed upon in *Abbott on Shipping*, 8th edit. p. 56,—“This decision is not perfectly satisfactory. It was stipulated by the charter-party that the master and crew should obey the *433] orders of the *naval commander who was appointed by the Crown, and who certainly was not the servant of the owners. Chief Justice Mansfield said ‘it was doubtful whether, by obeying the orders of the officer, it was meant that the officer *should see to the navigation and direct the motion of the ship*, or only direct to what place the ship should be carried for the purpose of being employed against the enemy.’ The case was hardly ripe for judgment until that doubt had been removed.” The jury were clearly not warranted by the evidence before them in finding the defendants guilty of negligence; and the learned judge ought to have told them, that, the vessels being in the service of the Queen, and no longer subject to the control of their owners, the latter were not responsible for any damage resulting from obedience to orders which they were bound to obey, and the propriety of which could not be questioned in a court of law.

CRESSWELL, J.—I am of opinion that this rule should be discharged. It was moved on two grounds,—first, that the verdict was against evidence,—secondly, misdirection. As to one part of my Lord’s direction, viz. that, if that which was done by the persons who had the management of the defendants’ vessel was done in obedience to a positive order of a superior whose orders they were bound to obey, the defendants would not be responsible for the consequences,—no objection has been

made, at least by the party moving. It is unnecessary, therefore, to discuss that, although I may observe in passing that I think it was perfectly right. As to the main question which my Lord left to the jury, viz. whether the defendants were guilty of negligence in omitting to drop their anchor upon the occurrence of the change of circumstances spoken of by the plaintiff's witnesses, it seems to me that that also was perfectly right. If there had been evidence of a direct and positive order from the *captain of the *Fury* to the masters of the *Orient* and *Courier* to continue to hold on by their hawsers under all circumstances, then I think the Lord Chief Justice would not have been justified in leaving that to the jury as he did. But, when we come to look at the evidence of Captain Chambers, it appears that that was not the nature of the order which he gave. He says, that, although the signal from the flag-ship might be and generally was considered as a signal for the whole fleet to anchor, he considered it right to give the orders he did to the *Orient* and the *Courier* to hold on by their hawsers. But, when he says afterwards that it would have been proper for those vessels to anchor when from a change in the weather in the course of the night a different state of circumstances arose, I construe that to mean, that his order was intended to apply only to the then existing state of circumstances, and not as a positive order which was not to be departed from under any circumstances. That being so, I think my Lord was quite right in leaving it to the jury as he did, to say whether or not the master and crew of the defendants' vessel acted in an unseamanlike manner in not letting go her anchor when a state of circumstances arose different from that which existed when Captain Chambers gave his original order to them to hang on by their hawser. As to the other branch of the rule, although possibly I might have been as well, or perhaps better, satisfied if the verdict had been the other way, still, as I do not find that the Lord Chief Justice expresses any dissatisfaction with it, I do not think we ought to interfere.

CROWDER, J.—It does not appear to me that there has been any misdirection in this case. It is admitted that the Lord Chief Justice told the jury that the defendants would not be responsible if the damage resulted from their acting in obedience to a positive order of the officer *under whose command they were: and I am of opinion that that ruling was perfectly correct. But if, after that order was given, a state of circumstances arose which was not and could not be contemplated at the time of giving the order, and which rendered it necessary to do that which they had been ordered not to do, I think the defendants would be clearly guilty of negligence and want of seamanship in blindly adhering to the original order. It was insisted, on the part of the defendants, that it was their duty to obey the order of Captain Chambers at all hazards, and that they had no discretion, and consequently are not responsible for the consequences. But Captain Cham-

bers himself puts a different construction upon the order. He says it was given only with reference to the state of circumstances existing at the time, and was never intended to apply when such an emergency arose as that which did afterwards arise. I think it is impossible to say that the matter was not properly presented to the jury. As to the evidence, I agree entirely with my Brother Cresswell.

WILLES, J.—I also think there was no misdirection, and no ground for quarrelling with the conclusion to which the jury came. It is unnecessary to express any opinion as to whether or not the Lord Chief Justice was right in laying it down as matter of law that the defendants would not be responsible for the damage sustained by the plaintiff's vessel if it resulted from their having acted in obedience to the lawful orders of a superior officer. In my opinion, however, that would afford a justification, not on the ground of martial law, but upon the ground that obedience on the part of those in charge of a vessel forming one of a fleet of transports on a service of this sort, to those placed in command over them, is essential, not only to the success of the undertaking, but also to the safety of all engaged in it. As to whether the *436] order given by Captain Chambers when the *Fury* first took up her position, was to be considered one from which the persons on board the *Orient* and the *Courier* were not at liberty under *any* circumstances to deviate, I entirely agree in what has fallen from my two learned Brothers. Upon the evidence of Captain Chambers, it was clearly right and proper to leave it to the jury to say whether or not a discretion was left in the master of the *Courier* to drop her anchor when a state of circumstances arose which rendered it dangerous to herself or to any of the neighbouring vessels to continue to hang on as at first directed.

COCKBURN, C. J.—I still entertain the opinion I expressed at the trial. Where two vessels are chartered by the government for an expedition such as that in question, one of the terms of the contract they enter into, is, that they shall pay implicit obedience to the persons who command it: therefore, if one of them sustains damage from the other whilst acting in obedience to the orders of a superior officer, the owner of the vessel doing the damage cannot be held responsible in a court of law to the owner of the vessel to which the damage is done. Consequently, if it had appeared here that the damage complained of had resulted from the master of the defendants' vessel acting in obedience to a direct and positive order of the captain of the *Fury*, I should have held that the defendants were not liable. But, when Captain Chambers, who gave the order, stated that he considered it not only left it open to the master of the *Courier*, but made it incumbent on him, upon the emergency which arose, to adopt the course which seamanship dictated, it was not any part of my duty to put my construction upon the propriety of Captain Chambers's interpretation of his own order. I

could do no other than leave it to the jury to say whether under the circumstances the *defendants' servants had exercised that skill and discretion which it was incumbent on them to exercise. [*437] There was considerable conflict of evidence upon the subject: and, although I should perhaps have been better pleased if a verdict had been found for the defendants upon that issue, still, the whole matter having been left to a very intelligent jury, who evidently bestowed great attention to the whole case, I cannot take upon myself to say that I am so far dissatisfied with the conclusion they have arrived at as to wish to have the case submitted to another jury. I think we ought not upon light grounds to interfere with the province of the jury, whom the law has made the constitutional judges in matters of fact.

Rule discharged.

James, for the defendants, prayed leave to appeal, pursuant to the 35th section of the Common Law Procedure Act, 1854,(a) against the decision of the court as to the direction.

COCKBURN, C. J.—None of us entertain any doubt as to the propriety of the decision, and therefore I do not think it a proper case for appeal. The whole turned *substantially upon the evidence of Captain [*438] Chambers: it is not a question of law.

CRESWELL, J.—There is no general principle of law involved in this case, so as to induce us, in our discretion, to think it desirable that an appeal should be allowed.

The rest of the court concurring,

James took nothing.

(a) That section enacts, that, "in all motions for a new trial upon the ground that the judge has not ruled according to law, if the rule to show cause be refused, or, if granted, be then discharged or made absolute, the party decided against may appeal, *provided any one of the judges dissent from the rule being refused, or, when granted, being discharged, or made absolute, as the case may be, or provided the court in its discretion think fit that an appeal should be allowed: provided, that, where the application for a new trial is upon a matter of discretion only, as, on the ground that the verdict was against the weight of evidence, or otherwise, no such appeal shall be allowed.*"

SYERS v. CHAPMAN. June 1.

In an action for an assault, it is competent to the defendant to give evidence of an assault by the plaintiff, without a plea of son assault demesne.

THIS was an action for an assault. Plea, not guilty.

The cause was tried before Crowder, J., at the first sitting at Westminster in this term, when a verdict was found for the plaintiff, damages one farthing.

Brown, for the plaintiff, moved for a new trial on the ground of surprise. The alleged surprise consisted in this, that the learned judge, being asked by the defendants' counsel to amend the record by adding a plea of son assault demesne, declined to allow the amendment, saying

that he must hear the evidence first; and that he received the evidence, although he ultimately refused to permit the plea to be added. [WILLES, J.—Was the reception of the evidence objected to on the part of the plaintiff?] It was not. [COCKBURN, C. J.—Could you have shut out the evidence if nothing had been said about adding the *489] plea?] Probably not. [COCKBURN, C. J.—*It is quite clear that the evidence was properly received: it was all part of the transaction.]

PER CURIAM.—There is no ground for this application. What was said about the amendment, did not make the evidence inadmissible which was clearly admissible without the amendment.

Rule refused.

END OF EASTER TERM.

CASES
ARGUED AND DECIDED
IN THE
COURT OF COMMON PLEAS,
AND IN THE
EXCHEQUER CHAMBER,
IN
Trinity Term,

IN THE TWENTIETH YEAR OF THE REIGN OF VICTORIA. 1857.

The Judges who usually sat in Banc in this Term, were,—

COCKBURN, C. J.,
CRESSWELL, J.,

WILLIAMS, J.,
WILLES, J.

COCKERELL v. AUCOMPTE. *May 31.*

By the rules of a coal-club (duly certified), provision was made for the appointment of a chairman, secretary, and treasurer, the latter of whom was to receive all moneys taken by the secretary, and to pay the coal-merchant as soon after every delivery of coals as he should receive an order signed by the secretary and chairman. It was then provided that certain weekly payments should be made by the members to the secretary, who were to be entitled at the end of twelve weeks to receive half a ton of coals for each share held by them. It was further provided that the secretary should, on the requisition of the members present at a meeting, apply for tenders to such coal-merchants as they should direct; that, when a tender was accepted at the following meeting, the secretary should agree with the merchant for the required supply,—the coals to be paid for “on the next Thursday night after each delivery, by an order on the treasurer, signed by the secretary and chairman.” The plaintiff having tendered to supply the club with about 100 tons of coals, at 23s. per ton, the secretary prepared an agreement for “100 tons, more or less,” at that price, which was signed by himself and the plaintiff, but, through the default of the secretary, there were not sufficient funds in the treasurer’s hands to pay for them:—

Held, that the secretary was the mere servant of the general body, and must be taken to have acted in that capacity in giving the order for the coals; that, as the club never parted with their control over the money in the hands of the treasurer, or authorized the secretary to expend it, but gave him authority to order the coals for them, and did not furnish him with funds to pay for them, but authorized a contract on credit, the contract so made must be taken to have been made on their credit, and consequently the defendant, as a member of the club, was liable.

THIS was an action for goods sold and delivered, with a count upon an account stated. Plea, never indebted.

*441] *The cause was tried before Willes, J., at the second sitting in London in Michaelmas Term last. The facts which appeared in evidence were as follows:—The plaintiff was a coal-merchant. The defendant was the landlord of a public-house in St. Martin's Court, Westminster, called "The Round Table," at which a certain coal-club, of which the defendant was a member, and which was known by the name of "The Royal Westminster Coal Society," held its meetings. The club was governed by certain rules which had been duly certified by Mr. John Tidd Pratt, the proper officer in that behalf, to be in conformity to law and with the provisions of the statute 10 G. 4, c. 56, as amended by the 4 & 5 W. 4, c. 40.

The material articles of these rules were the following:—

"Art. 1. That this society is established for the economical supply of coals to its members, and shall be called or styled 'The Royal Westminster Coal Society;' shall hold its meetings at the sign of 'The Round Table,' St. Martin's Court, Westminster; shall consist of an unlimited number, and any person residing not beyond two miles shall be eligible to become a member; to meet for the payment of money and other business every Thursday throughout the year, from 8 to 10 o'clock in the evening (unless Christmas Day, then on the following evening); that, for taking money from the members at the bar, use of room, firing, lighting, &c., the landlord be allowed 20s. per quarter.

*442] *"2. That a member present shall be chosen, by his own consent, every meeting night, to be chairman on the following one, for which he shall receive, if he attends, 1s., and be fined 1s. in case of neglect.

"3. That Messrs. Whitbread & Co. be appointed treasurers of this society, and will receive all moneys taken by the secretary, to whom they shall give a receipt for the same, pay the coal-merchant as soon after every delivery (and all other expenses of the society) as they shall receive an order signed by the secretary and chairman, and keep the balance in their possession till the end of every second quarter, when it must be given up to be divided, according to article 14.

"4. That Mr. John Kearns is appointed secretary, whose duty it will be to attend every Thursday night, from 8 to 10 o'clock, to receive the payments of the members, and insert in the books to be provided by the society for that purpose, the names, places of abode, the quantity of coals required, and the amount paid in by each member, which books are to be checked, and the money paid into the hands of the treasurers, by the secretary, before the next meeting night, who shall take a receipt for the amount, and each shall keep an entry book: he shall also make up his accounts and balance with the treasurers at the end of every quarter, and enter the same in the minute-book. The secretary

to be paid 3*d.* for each member every twelfth night, for each half-ton share, 1*s.* per night, for refreshment, and 2*d.* each for all letters or summonses: he shall give security for cash, books, or other property intrusted to him, if required, and be fined 1*s.* for any neglect of duty, if so desired by a majority present.

"9. That, when necessary, the secretary shall write to such coal-merchants as a majority of the members present may require, for tenders to supply the society with as many tons of the best Wallsend coals (mentioning *name) as may be considered requisite for the following quarter or quarters, to be delivered in quarterly [*443 portions at the members' houses, free of expense. The tenders to be opened on the following meeting night, and finally determined by a majority of the members present which one shall be accepted. The secretary shall then draw up an agreement which the merchant must sign; and, if he does not perform it, the members to be at liberty to elect another merchant for the term of the contract, and the party shall be sued for any loss that may be sustained by the non-performance of his contract. On the next Thursday night after each delivery, an order on the treasurer for payment, signed by the secretary and chairman, shall be given to the merchant.

"12. There shall be four quarterly deliveries or clubs every year, each to continue twelve weeks, and members will be allowed to enter or retire at any time, subject to the following terms:—Every member to have as many shares as he may think proper, by paying 1*s.* per week for each share: after having paid twelve weeks, to be entitled to half a ton of the best Wallsend coals for each share, delivered at his house free of every other expense,—unless at any time the coals cannot be purchased at 23*s.* per ton, then a proportionate sum per share extra each quarter must be paid by the members.

"14. That all money received, in whatever shape, shall be carried to stock, out of which the coal merchant, the secretary's salary, and every other legal demand, shall be paid; after which the balance remaining at the end of every second quarter shall be equally divided (in proportion to the number of shares each member possessed) amongst those persons only who have belonged to the society both those quarters.

"15. That any person, male or female, may become a shareholder of this society, for one, two, or more quarters, without personal attendance, risk, or inconvenience,—*it only being necessary to send the money in one sum, or, if paid by instalments, every [*444 three weeks."

In May, 1855, the plaintiff, having been applied to by one Kearns, the secretary of the club, for a tender for coals for the members, sent in the following:—

"May 10th, 1855.

"Gentlemen,—We hereby tender to supply you with about 100 tons
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of the best Sunderland Wallsend coals, screened, either Hetton's, Stewart's, or Lampton's, at 23s. per ton, net. "G. J. COCKERELL.

"To the Chairman and Members of the Royal Westminster Coal Society."

This tender having been accepted by the club at a meeting held the same night, the following agreement was drawn up by the secretary, and signed by him and by the plaintiff:—

"Memorandum of agreement between the Royal Westminster Coal Society, held at The Round Table tavern, St. Martin's Court, in the parish of St. Martin-in-the-Fields, on the one part, and George Joseph Cockerell, coal-merchant, Earl Street, Blackfriars, on the other part, both in the county of Middlesex: Whereas, the said George Joseph Cockerell agrees to supply the various members of the above-named society with about one hundred tons (more or less) of the best Wallsend coals, and free from dust, at the sum of 23s. per ton: to be delivered at the members' residences free from all extra charges. The delivery to be completed within ten days of the 19th day of May, 1855, unless altered or countermanded by the secretary, John Kearns, jun. As witness the hands of the secretary and others of the above society, and the said George Joseph Cockerell, this 11th day of May, 1855.

"JOHN KEARNS,

"G. J. COCKERELL."

"Witness, JOHN ROGERS."

*445] "Orders were afterwards given by the secretary for the delivery of coals to several of the members of the club, and they were delivered accordingly to the extent of 127½ tons. But it turned out that the secretary had omitted to pay into the hands of the treasurers all the moneys which he had received from the members of the club; and the sum in the hands of the treasurers, 100l. (which was paid over to the plaintiff, by a check drawn upon Messrs. Whitbread, and signed by the defendant as chairman of the meeting), proving insufficient to satisfy the plaintiff's demand, this action was brought to recover the difference,—46l. 12s. 6d.

On the part of the defendant, it was insisted that Kearns, the secretary, had no authority to order coals on the credit of the members of the club.

The learned judge, however, ruled that there was evidence of such authority; and a verdict was accordingly entered for the plaintiff, damages, 46l. 12s. 6d., leave being reserved to the defendant to move to enter a verdict for him, or a nonsuit, if the court should be of opinion that there was no evidence of authority to deal on credit.

Udall, in Michaelmas Term, obtained a rule nisi accordingly; or for a new trial, on the ground that the verdict was against the evidence, unless the plaintiff would consent to the damages being reduced to 15l.

Knowles, Q. C., and Skinner, in Easter Term, showed cause.(a)—By the rules of this society, the secretary is *made the agent of all its members for the purpose of ordering the coals; and, inas- [*446 much as the coals were not to be paid for on delivery, but when the treasurers should receive an order signed by the secretary and chairman, it must be assumed that there was to be a credit given of some extent. Each member of the society, therefore, became responsible for the whole amount. In *Everett v. Tindall*, 5 Esp. N. P. C. 169, it was held, that, where several persons in a club joined to buy a quantity of coals, and afterwards subdivided their shares, and the coals were delivered to each member, each could not maintain an action for the penalty against the seller, for deficiency of measure, the contract of sale being joint. Lord Ellenborough said, "It was a joint contract with all the members. If an action had been brought for not delivering the coals, all the members must have joined in the action, for there was no separate contract with each." That case is precisely in point. [COCKBURN, C. J.—Do the rules import that all the members of the club are bound by a resolution to contract on credit, though not present?] From the very nature of the thing, it must be so. [CRESSWELL, J., referred to *Fleming v. Hector*, 2 M. & W. 172,† where a club was formed, subject to the following among other rules, viz. that the entrance fee on admission should be ten guineas, and the annual subscription five guineas; that, if the subscription were not paid within a certain limited period, the defaulter should cease to be a member; that there should be a committee to manage the *affairs of the [*447 club, to be chosen at a general meeting; and that all members should discharge their club bills daily, the steward being authorized, in default of payment on request, to refuse to continue to supply them,—and it was held, that the members of the club, merely as such, were not liable for debts incurred by the committee for work done or goods supplied for the use of the club; for, that the committee had no authority to pledge the personal credit of the members.] The 8d rule in this case expressly shows that payment on delivery was not contemplated. [COCKBURN, C. J.—The distinction between *Fleming v. Hector* and *Todd v. Emly*, 7 M. & W. 427,† and the present case, is, that there the work was done and the goods supplied to the aggregate body: here, the coals were delivered to the individual members.] The difference is rather in the plaintiff's favour. [COCKBURN, C. J.—I think not.] The

(a) The defendant's attorney having omitted to bespeak the judge's notes, the court refused to allow the case to proceed; Cresswell, J., observing that the fee payable under the scale of Michaelmas Term, 1852 (5s.), had to be accounted for to the Treasury, and therefore the court had no discretion.

Will stated that the impression amongst attorneys was, that the fee alluded to was only payable where the notes to be produced were those of a judge of another court.

(b) Cresswell, J.—The fee is payable in all cases. I remember the late Lord Chief Justice to have so laid down and acted upon the rule not very long since.

The attorney being in court, the fee was handed to the master, and the notes were read.

secretary clearly is the agent of the general body. If he has acted within the scope of the authority conferred upon him by the rules, the whole body are bound. The general scope of the rules makes the whole of the members responsible for resolutions by the majority present at each meeting. In *Gouthwaite v. Duckworth*, 12 East, 421, 426, Lord Ellenborough says: "If all agree to share in goods to be purchased, and, in consequence of that agreement, one of them go into the market and make the purchase, it is the same for this purpose as if all the names had been announced to the seller, and therefore all are liable for the value of them." The same principle was laid down by Abbott, C. J., in *Keasley v. Codd*, 2 C. & P. 408 (E. C. L. R. vol. 12), and by Bayley, J., in *Maudslay v. Le Blanc*, 2 C. & P. 409. [CRESSWELL, J.—There can be no doubt about that.] As to that part of the rule which seeks to reduce the damages, there clearly is no pretence for it. The argument on the other side will be, that, inasmuch as the authority, *448] if any, was to contract for one hundred tons of coal only, and twenty-seven tons and a half were delivered beyond that quantity, the members of the club cannot be liable for the excess. But, in the first place, the contract authorized by the resolution of the meeting was for one hundred tons, more or less: and, besides, it was proved that the secretary had received subscriptions enough to cover the whole amount delivered.

Udall, in support of the rule.—The rules contemplate that no coal should be ordered until there was a fund in the hands of the treasurers sufficient to pay for them, and that no personal liability should be incurred by any member beyond the amount of his or her subscription. The 15th rule shows this. There was no authority in the secretary of the club to contract debts upon the responsibility of the members. The rule which governs all cases of this sort is that which is laid down in *Fleming v. Hector*, 2 M. & W. 172,† and *Todd v. Emly*, 7 M. & W. 427.† In the former of these cases, Parke, B., says: "It appears to be quite clear that the club was formed upon ready money principles: the committee did, however, enter into some contracts upon credit, and it is said that the defendant has sanctioned this,—of which there is no evidence at all: and the case could go to the jury only on the ground of there having been such sanction on the part of the defendant. First, as to the construction of the rules of this club. Referring to these rules, it appears to be clear that the intention of the club was, to provide a fund, to be administered by the committee, and to provide the means of the society's carrying on their concerns without the necessity of dealing on credit." After referring to several of the rules, his Lordship proceeded: "It is quite clear, from the provisions of these rules, that the society contemplated that there should be a fund in hand to meet the expenses. The 40th rule, which is relied upon as giving

the committee *authority to bind the defendant, only provides [*449 that they should manage the affairs of the club. Now, I think it is impossible to come to any other conclusion on the true construction of those rules, than that all the committee was to do, was, to manage the fund thus supplied; and, if they chose to enter into contracts upon credit when they had not sufficient funds, that, is their own affair. There is no evidence in the case to warrant any conclusion that a society of this nature should have gone on dealing upon credit: all the committee had to do, was, either to pay ready money, or not to enter into any contract until they had money in hand: or, if they chose to do so, it was mere matter of convenience, and they were not to suppose they were binding the members individually to pay, for they had the means of payment in their hands." This was not a contract such as was contemplated by the rules at all. [WILLES, J.—What do you suggest should have been the form of the contract? It was intended that the coal-merchant should supply the coals at the price mentioned. There must be some consideration to bind him: and that I presume was the agreement of somebody that the coals should be paid for.] The contract was with Kearns: and the intention was, to bind the fund only. [COCKBURN, C. J.—The memorandum does not profess to bind anybody. The resolution at the meeting of the 10th of May authorized the secretary to make the contract.] Only to make a contract that should be consistent with the rules of the club,—that is, subject to payment by order on the treasurer, the funds being in hand, on the next Thursday night: rule 9. This contract was altogether ultra vires. In the case of *The St. James's Club*, 2 De Gex, M'N. & G. 388, where it was held that clubs are not "partnerships or associations" within the meaning of the provisions of the Joint Stock Companies Winding-up Acts, Lord St. *Leonards says: "The law which was at one time uncertain [*450 is now settled, that no member of a club is liable to a creditor, except so far as he has assented to the contract in respect of which such liability has arisen. The member pays on the spot, and were he also liable to those supplying the articles, he would pay twice over." Those observations equally apply here; for, by the 12th rule, no member can be entitled to any coals until he has paid subscriptions to the full value. The cases cited on the other side are cases of trading partnerships, which stand upon a totally different footing. The 11th section of the "Industrial and Provident Societies Act, 1852," 15 & 16 Vict. c. 31, which enacts that "nothing in this or the recited act (13 & 14 Vict. c. 115) shall be construed to restrict in any wise the liability of the members of any society established under or by virtue of this act, or claiming the benefit thereof, to the lawful debts and engagements of such society: provided always that no person shall be liable for the debts or engagements of any such society after the expiration of two years from his ceasing to be a member of the same," seems to assume, that, but

for some such enactment, such liability would exist. At all events, the contract only authorized the delivery of one hundred tons ; consequently the defendant could not be made responsible for the 27½ tons delivered in excess. [CRESSWELL, J.—There clearly is no ground for asking that the damages may be reduced.] Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court.

This was an action for goods sold and delivered. Plea, never indebted.

The cause was tried before Willes, J., at the sittings in London in Michaelmas Term last, when it appeared in *evidence, that the *451] plaintiff was a coal-merchant, and the defendant a member of a coal-club, governed by certain rules which had been certified by Mr. Tidd Pratt to be in conformity to law, and with the provisions of the statute 10 G. 4, c. 56, as amended by the 4 & 5 W. 4, c. 40.

The plaintiff made a tender to supply coals to the society, which was accepted by them, and a contract was entered into in these words:—[His Lordship read it.] The secretary afterwards gave an order for the delivery of the coals, which were delivered to the several members of the club. When the time for payment arrived, it appeared that the secretary had not duly paid to the treasurers all the money received by him: and the sum in the treasurers' hands did not amount to the sum due to the plaintiff. The money in Whitbread's hands was paid to him; and for the difference this action was brought against the defendant, a member of the club.

On the trial it was contended on his behalf, that the secretary had no authority to order coals on the credit of the members of the club. The learned judge ruled that there was evidence of such authority; and the plaintiff thereupon had a verdict, the defendant having leave to move to enter a nonsuit. Another point was made, for the reduction of damages, because more than 100 tons was supplied; but the court during the argument intimated that it could not be sustained; and it is not worthy of further notice.

On showing cause, it was contended that the rules of the club made the secretary the agent of all the members of the club in ordering coals, and that, as it appeared that the coals were to be paid for, not on delivery, but on a future day, by an order on the treasurer signed by the secretary and the chairman of the next meeting held after the delivery of the coals, credit in the mean time must be given to the members of the club. On the other hand, it was contended that this *452] club was as to *debts similar to other clubs, and that according to the law laid down in *Fleming v. Hector*, 2 M. & W. 172,† the members of the club were not responsible for goods supplied by the order of the secretary, each member having previously made payments into his hands sufficient to pay for the coals supplied to him.

After a careful examination of the rules of the club, we are of opinion that this rule must be discharged.

The 3d rule was in these terms,—“That Messrs. Whitbread & Co. be appointed treasurers of this society, and will receive all moneys taken by the secretary, to whom they shall give a receipt for the same, pay the coal-merchant as soon after every delivery (and all other expenses of the society) as they shall receive an order signed by the secretary and chairman, and keep the balance in their possession till the end of every second quarter, when it must be given up to be divided according to Article XIV.”

The 14th rule was as follows:—[His lordship read it.] According to the third rule, then, the money placed in the hands of the treasurer was not to be paid out at the will of the secretary, but upon an order signed by him and the chairman of a meeting to be held after the debt was incurred, as appeared by the 9th rule, which is the most important. [His lordship read it.] This rule shows that the secretary had no general authority vested in him to administer the funds of the club, or to conduct the business, or provide coals for the club.

The members were to choose the party with whom a contract was to be made. That election having been made, the secretary was to draw up an agreement for the merchant to sign; but, if the latter did not fulfil it to the satisfaction of the members of the club, they, and not the secretary, were to elect another merchant; and, after the contract was performed, the secretary had no power to apply the funds of the club in satisfaction *of the debt contracted, but could only [*458 act in conjunction with the chairman elected at a subsequent meeting of the club. He was, therefore, throughout a mere servant of the general body, and must be taken to have acted in that capacity in giving the order for the coals the price of which is sought to be recovered in this action. The club never parted with their control over the money in the hands of the treasurer. They never authorized the secretary to expend it. They cannot deny that they authorized him to order the coals for them; and, as they did not furnish him with funds to pay for them, but authorized a contract on credit, the contract so made must have been on their credit, and not on that of their servant.

We are therefore of opinion that this rule must be discharged, and, in so doing, we do not mean in the slightest degree to impugn the correctness of the decision of the Court of Exchequer in *Fleming v. Hector*, 2 M. & W. 172,† and *Todd v. Emly*, 7 M. & W. 427.†

Rule discharged.

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*FLORENCE v. JENINGS. June 12.

The plaintiff discounted for the defendant a bill for 250*l.*, drawn by the latter upon one A., the defendant and A. at the same time signing the following memorandum, addressed to the plaintiff:—"Sir,—In consideration of your discounting the under-mentioned bill, we do hereby jointly and severally undertake, if the same is not wholly paid at maturity, to pay, as interest thereon, 20*l.* for each month, any portion of which shall have elapsed after maturity of the said bill, and until the same is wholly paid and satisfied." At the foot of this memorandum was written, "250*l.* Jenings on A. at three months."

The bill not having been paid at maturity, the plaintiff sued the defendant thereon, claiming by the particulars endorsed on the writ interest at the rate of 20*l.* per month, as per agreement, but declaring only on the bill, and obtained a verdict and judgment thereon.

The plaintiff afterwards brought another action against the defendant upon the agreement for the stipulated interest of 20*l.* per month:—

Held, that the former judgment was no answer to the plaintiff's claim for interest accruing before the recovery of such judgment, but that the plaintiff was not entitled to recover in the second action interest accruing since.

THIS was an action upon a special agreement. The declaration stated that theretofore, to wit, on the 3d of March, 1855, in consideration that the plaintiff, at the request of the defendant, would discount for the defendant a certain bill of exchange for 250*l.* drawn by the defendant on and accepted by W. A. D'Arcy, and dated the 3d of March, 1855, and payable three months after date, the defendant promised the plaintiff, if the said bill was not wholly paid at maturity, to pay the plaintiff, as interest thereon, the sum of 20*l.* for each month any portion of which should have elapsed after maturity of the said bill and until the same should be wholly paid and satisfied; that, relying on the said promise, the plaintiff did then discount for the defendant the said bill; that the said bill was not wholly paid at maturity, but was duly presented for payment and dishonoured,—whereof the defendant had due notice; that divers, to wit, twelve months and part of another month elapsed after the maturity of the said bill, and before the same was wholly paid, and before this suit; that all things on the plaintiff's part necessary to be done and to happen to entitle him to be paid by the defendant the said 20*l.* per month for the said months, were done and happened; and that the time for the defendant to pay the said 20*l.* per month for the said months had elapsed *before this suit; *455] yet that the defendant had not paid the said 20*l.* per month, or any part thereof, and the said 20*l.* per month for the said months, amounting to a large sum, to wit, 260*l.*, still remained wholly due and unpaid to the plaintiff: and the plaintiff claimed 260*l.*

The defendant pleaded,—first, that the promise mentioned in the declaration is a promise contained in a memorandum in writing, signed by the defendant, and addressed to the plaintiff, as follows, that is to say,—“London, 3d March, 1855. Mr. J. H. Florence. Sir,—In consideration of your discounting the under-mentioned bill, we do hereby jointly and severally undertake if the same is not wholly paid at maturity, to pay, as interest thereon, 20*l.* for each month any portion of

which shall have elapsed after maturity of the said bill and until the same is wholly paid and satisfied. W. A. D'ARCY. G. B. JENINGS. 250*l*. Jenings on D'Arcy, at 8 m.d.:" That he, the defendant, never made any such promise as mentioned in the declaration, other than the promise contained in the said memorandum: That, after the making of the said contract, and after the breach thereof by the defendant, and before this suit, to wit, on the 19th of June, 1855, the plaintiff caused to be issued out of this court a certain writ of summons against the now defendant, dated on the day and year last aforesaid, and in the form provided by the Common Law Procedure Act, 1852, and commanding the now defendant, within eight days after the service of that writ upon him, inclusive of the day of such service, to cause an appearance to be entered for him in this court in an action at the suit of the now plaintiff, which writ was specially endorsed pursuant to the said act; and the particulars of the plaintiff's claim in the said action endorsed on the said writ are as follows, that is to say,—“The following are the particulars of plaintiff's claim. 250*l*. on a bill of exchange for 250*l*., dated the 3d of *March, 1855, drawn by the defendant. The plain- [*456
tiff also claims interest on the above sum at the rate of 20*l*. per month, or for any part of a month, as per agreement:” That the bill of exchange mentioned in the said special endorsement was the same bill of exchange mentioned in the declaration herein, and was dated on the 3d of March, 1855, and became due on the 6th of June, 1855, and that the sum of 250*l*. mentioned in the said special endorsement is the principal sum payable by virtue of the said bill of exchange, and that the agreement mentioned in the said special endorsement is the contract in writing above set forth and no other agreement, and that the interest claimed on the said writ is all the interest then due on the said bill: That the plaintiff, on the 1st of August, 1855, declared upon the said writ of summons in the said action against the now defendants, as follows, that is to say,—“In the Common Pleas. The 1st day of August, in the year of our Lord, 1855. London, to wit. John Henry Florence, by William Heath, his attorney, sues G. B. Jenings, For that the defendant, on the 3d of March, 1855, by his bill of exchange, now overdue, directed to one W. A. D'Arcy, requested the said W. A. D'Arcy to pay to the order of the said defendant 250*l*. two months after date; and the said W. A. D'Arcy accepted the same, and the said bill was then endorsed by the defendant to the plaintiff; and the said bill was duly presented for payment, and dishonoured, of which the defendant had due notice, but did not pay the same; and the plaintiff claims 400*l*.:” That the bill of exchange mentioned in the said declaration is the same bill of exchange mentioned in the said special endorsement, and no other bill: That the defendant said nothing in bar or preclusion of the said action of the plaintiff; whereby the plaintiff remained therein undefended against the defendant: therefore it was on the 19th

*457] of November, 1855, and before this suit, considered *by the said court that the plaintiff should, and he did then, by the said judgment, recover 265*l.* 9*s.* 6*d.* against the now defendant in the said action, for damages for the non-payment of the said bill, and for his the plaintiff's costs of the said suit: That the plaintiff could and might have signed judgment for and recovered in the said action, upon the defendant's said default in pleading, the amount of the said bill *with interest thereon* at the rate claimed in the said special endorsement, up to the date of such judgment: And that the plaintiff, from the time of recovering the said judgment, had ceased to forbear to the defendant the payment of the said bill.

Second plea,—as to the declaration so far as it claimed interest for the period of time since the time on the 19th of November, 1855, when the judgment thereafter mentioned was recovered, the defendant thereby referred to the statements contained in the first plea which preceded the statement therein contained that the plaintiff recovered judgment as therein mentioned, and prayed that the same might be considered as incorporated or repeated in that plea: And he further said that the statements so referred to were true, and that the plaintiff, on the 1st day of August, 1855, declared upon the said writ of summons in the said action against the now defendant as follows, that is to say,—“In the Common Pleas. The first day of August, in the year of our Lord 1855. London, to wit. John Henry Florence, by William Heath, his attorney, sues G. B. Jenings: For that the defendant, on the 30th of March, 1855, by his bill of exchange, now overdue, directed to one W. A. D'Arcy, requested the said W. A. D'Arcy to pay to the order of the said defendant 250*l.* two months after date; and the said W. A. D'Arcy accepted the same; and the said bill was then endorsed by the defendant to the plaintiff; and the said bill was *458] duly presented for *payment, and dishonoured,—of which the defendant had due notice, but did not pay the same: and the plaintiff claimed 400*l.*: That the bill of exchange mentioned in the said declaration was the same bill of exchange mentioned in the said special endorsement, and no other bill: That, afterwards, to wit, on the 19th of November, 1855, the plaintiff, by the judgment of the said court, recovered in the said action against the now defendant, by default of the now defendant in pleading, 265*l.* 9*s.* 6*d.* upon, for, and in respect of the claim made in and by the said declaration as aforesaid, and upon, for, and in respect of the said bill, and damages by reason of the non-payment thereof, and for the plaintiff's costs of the said suit: And that the plaintiff, from the time of recovering the said judgment, had ceased to forbear to the defendant the payment of the said bill.

. Replication to the first plea, and by way of distinct and separate replication as to the second plea, that the defendant duly appeared in this court to the said writ according to the exigency thereof, and before

operation of the statute of limitations, Bosanquet, J., said: "The cause of action must be the principal money due: the interest is only accessory, and *accessorium sequitur suum principale*." So in *Clark v. Alexander*, 8 Scott, N. R. 147, 165, Tindal, C. J., says: "It is scarcely necessary to say, that, if the plaintiff is barred from recovering the principal, he must be equally barred from recovering the interest, which is an accessory only, and must follow the nature of the principal. When the bill was sued on, the right to the interest existed: it was not discretionary with the jury whether they would give interest or not: they were bound to give it: *Laing v. Stone*, 2 M. & R. 561 (E. C. L. R. vol. 17). [COCKBURN, C. J.—There was no express agreement for interest there.] Without any agreement, the plaintiff would be entitled to interest: with an agreement, he is by the rule of court(a) entitled to interest at the rate agreed upon. [WILLES, J.—It may be a question whether the 20*l.* per month was not in the nature of a penalty.] It *461] is expressly reserved "as interest on the bill." [CROWDER, J.—Do you find any case where the jury have given more than 5 per cent. interest?] None. [COCKBURN, C. J.—It is difficult to see how interest secured by a collateral agreement could be recovered in a count upon the bill.] If stipulated for on the face of the bill, the interest is part of the debt: if not, it is recoverable as damages for the detention of the debt,—the rate agreed upon by the parties, if any, superseding the current rate of interest. This right is recognised by the 2 & 3 Vict. c. 37, s. 2, which provided that nothing in the act contained should be construed to enable any person or persons to claim in a court of law or equity more than 5 per cent. interest on any account or on any contract or engagement, notwithstanding they may be relieved from the penalties against usury, *unless it should appear to the court that any different rate of interest was agreed to between the parties*. The case of *Seddon v. Tutop*, 6 T. R. 607, at first sight, appears to be an authority against the defendant. The plaintiff had in a former action declared on a promissory note, *and for goods sold*, but, upon executing a writ of inquiry after judgment by default, gave no evidence on the count for goods sold, and took damages for the amount of the promissory note only: and it was held that the judgment thereupon was no bar to his recovering in a subsequent action for the same goods. That case, however, is explained in *Lord Bagot v. Williams*, 3 B. & C. 235 (E. C. L. R. vol. 10), 5 D. & R. 87(b) (E. C. L. R. vol. 16), where

(a) Rule 76 of Hilary Term, 1853,—13 C. B. 20 (E. C. L. R. vol. 76). "Every writ of execution shall be endorsed with a direction to the sheriff or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of 4*l.* per centum per annum from the time when the judgment was entered up, or, if it was entered up before the 1st of October, 1833, then from that day: provided that, in cases where there is an agreement between the parties that more than 4 per cent. interest shall be secured by the judgment, then the endorsement may be accordingly to levy the amount of interest so agreed."

(b) And see *Dunn v. Murray*, 9 B. & C. 780 (E. C. L. R. vol. 17), 4 M. & R. 87.

Bayley, J., says: "The case of *Seddon v. Tutop* is distinguishable from the present: the ground of the decision in that case was, that no evidence had been given in the first action, on the count for goods sold and delivered, but that the plaintiff recovered a verdict merely on the count for the promissory note; and it was held, that *the judgment in that action was no bar to his recovering in a subsequent action for goods sold. In this case, Lord Bagot, at the time when the first action was commenced, had a demand on the defendant, not for one specific sum of money, but for different sums of money received by the defendant on his account from different persons and at different times. His agent knew that he had claims in respect of all the sums now claimed, except 46*l.*; and, having that knowledge, he formed an opinion that 3400*l.* was the whole sum which Lord Bagot ought to claim; and, if he acted upon that opinion, it is much the same thing as if a plaintiff in a cause at *Nisi Prius*, having a demand of 60*l.*, consisting of three sums of 20*l.*, which became due to him at different times, consented to take a verdict for 40*l.* If the jury in such a case, at the suggestion of the plaintiff, reduced the verdict to 40*l.*, he would be bound by it, and could not afterwards bring a second action for the other 20*l.* It seems to me that he is equally bound by his own act in this case, as he would have been by the verdict of a jury in the other, and that, having chosen to abandon his claim once, he has done it for ever." The result of those two cases clearly supports the defendant's argument here. The plaintiff by his replication sets up the 98d section of the Common Law Procedure Act, 1852, which enacts, that, "in actions where the plaintiff seeks to recover a debt or liquidated demand in money, judgment by default shall be final," thereby meaning to suggest that he had no opportunity to obtain the interest in the shape of damages. But, having at his own election chosen to treat it as a liquidated demand, and so foregone his right to interest, he cannot now maintain a separate action for it. [CROWDER, J.—The agreement as to the 20*l.* per month for interest could not be gone into before the master.] There might have been an inquiry in the action on the bill.

**Manisty*, *contra*. (a)—There were two separate and distinct contracts between these parties, giving rise to separate and dis-

(a) The points marked for argument on the part of the plaintiff, were as follows:—

"1. The plaintiff by appearing resisted the plaintiff's claim endorsed on the writ, and the plaintiff by not declaring on the agreement to pay the 20*l.* per month was precluded from recovering in the former action any part of the present claim:

"2. The contract now sued on, and the endorsement by the defendant to the plaintiff of the bill of exchange sued on in the former action, are distinct contracts, and the 20*l.* per month now sued for was not confessed nor recoverable in the former action, as the defendant did not by the contract then sued on agree to pay it:

"3. As the plaintiff did not in fact recover the 20*l.* per month in the former action, he is not estopped by the former judgment:

"4. If the judgment at all applies to the present claim, it is only so much of it as was due at the time of the judgment. This objection renders the first plea bad, as too extensive, and the second bad altogether, inasmuch as the interest to which the second plea is pleaded, is the very interest to which the judgment could not apply."

tinct causes of action,—the one upon the bill drawn by the defendant upon and accepted by D'Arcy,—the other upon the agreement, by which the defendant and D'Arcy, in consideration of the plaintiff's discounting the bill, jointly and severally undertook, if the same was not wholly paid at maturity, to pay, as interest thereon, 20*l.* per month until the bill should be wholly satisfied. It was competent to the plaintiff, on default being made, to bring an action against the plaintiff and another against D'Arcy, or to bring an action against the two jointly. The plaintiff has brought an action against the defendant upon the bill, and has recovered judgment therein by default: and the question is, whether the recovery of that judgment is an answer to this action upon the collateral agreement. The principles relied on on the other side have no application here. *Seddon v. Tutop* is a distinct authority, and has *464] always been acted upon, and never overruled. Lord Kenyon's judgment in that case is very much to the purpose here. He says: "It is admitted that the plaintiffs had two demands against the defendant, the one on a promissory note, the other for goods sold, and that, on executing the writ of inquiry in the former action, evidence was only given on the first demand, that the plaintiffs recovered damages adapted to that demand, and that the other demand for the goods still remains unsatisfied. By attending to the pleadings in this action, it will also be found that the plaintiffs are right in point of form. The issue was, whether the damages demanded in this action have been already satisfied by the money in the former action: and most clearly they have not. The case of *Markham v. Middleton*, 2 *Stra.* 1259, is extremely different from the present. There, the plaintiff had but one demand; and, though the jury gave inadequate damages for that demand on account of the plaintiff's not being prepared with proof of his whole bill, he would have been barred by that verdict if it had stood: but, in this case, there were two distinct demands, not in the least blended together; and, though the plaintiffs might in the first action have proved this demand, owing to inadvertence they did not, and the recovery of the note in that action is no bar to their demand in this, which is for goods sold. In truth, this is a question of great delicacy: we must take care not to tempt persons to try experiments in one action, and, when they fail, to suffer them to bring other actions for the same demand: the plaintiff who brings a second action ought not to leave it to nice investigation to see whether the two causes of action be the same; he ought to show beyond controversy that the second is a different cause of action from the first, in which he failed. In this case it is clearly shown that this demand was not inquired into in the former *465] action." The interest sought to be recovered *in this action is not, as suggested, accessory to the bill: the plaintiff's right to it arises altogether collaterally to the bill. [CROWDER, J.—Suppose the plaintiff had endorsed the bill away, what would have happened?]

The endorsement of the bill, it is submitted, could not affect the contract now declared on. It is not a cause of action that would run with the bill. The holder of the bill could recover no more than ordinary interest. [CROWDER, J.—Could two persons at the same time recover interest on the bill?] Why not? The defendant and D'Arcy, by a contract quite distinct and collateral, have agreed to pay 20*l.* per month. [CRESSWELL, J.—*As interest on the bill.*] The defendant is liable upon the bill, with all its legal consequences, in whose hands soever it may be: and he is also liable for the performance of the express contract he has collaterally entered into. The second plea, which is addressed to the interest accruing since the time of signing the judgment, is subject to the same observations.

Keane, in reply.—If the 20*l.* per month is interest payable on the bill, it could only be recoverable as accessory to the principal debt. If it be a penalty, there should have been an assessment of damages upon a writ of inquiry. The plaintiff not having adopted that course, has foregone his remedy. The argument on the other side is clearly not consistent with the decision of this court in the case of *Florence v. Drayson*, 1 C. B. N. S. 584 (E. C. L. R. vol. 87).

Cur. adv. vult.

COCKBURN, C. J., now delivered the judgment of the court:—

It appears to us, upon the authority of *Florence v. Drayson*, 1 C. B. N. S. 584, that interest could be recovered upon the contract set out in the pleadings, if at *all, only for such period as ordinary [*466 interest could be recovered upon the bill, in the absence of any express agreement.

The interest due under the contract, though constituting a distinct debt, and properly declared for in a count upon the agreement, or for interest, is only a substitute for the interest ordinarily recoverable as damages upon a bill. Therefore, when judgment was recovered, and the claim upon the bill passed into *res judicata* (so that any further interest payable would be upon the judgment, under the statute, not upon the bill), the right to interest under the agreement ceased. As to the interest which accrued previously to the judgment, however, the judgment is no answer. It is clear that the plaintiff has not recovered the interest now claimed in the action upon the bill. And, looking at the declaration, which determined the scope of that action, the plaintiff could not have recovered such interest in that action, for want of a count upon the agreement, or for interest.

For these reasons, we give judgment for the plaintiff upon the first plea, which is pleaded in answer to the claim for interest, both before as well as after the judgment, and for the defendant upon the second plea, which is pleaded in answer to the claim for interest after the judgment only.

Judgment for the plaintiff on the demurrer to the first plea.

Judgment for the defendant on the demurrer to the second plea.

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*JENINGS v. FLORENCE. June 12.

In an action for maliciously and without reasonable or probable cause causing the plaintiff to be arrested under a ca. sa. issued upon a judgment obtained by the defendant against him, and upon which the defendant maliciously and without reasonable or probable cause endorsed a direction to levy the whole amount recovered by the judgment, whereas a portion of that amount had been previously satisfied,—the declaration alleged, as damage caused by the arrest, for the greater amount, that the plaintiff was, after he was taken, during his detention, and before his discharge, able and willing and offered to pay, and always afterwards during his detention was willing to pay, and was finally discharged from imprisonment upon paying, the smaller sum; and that the plaintiff, by reason of the premises, was necessarily put to and incurred divers costs and expenses in and about obtaining his discharge :—Held, that the declaration sufficiently showed special damage resulting to the plaintiff from the arrest,—inasmuch as, to entitle him to a verdict, the plaintiff must show, not merely that he was arrested and kept in custody for a greater amount than was due, however improperly endorsed, but also that, by reason of the arrest and detention for the larger sum, his imprisonment was prolonged, or the expense of obtaining his discharge increased.

THIS was an action for maliciously and without reasonable or probable cause arresting the plaintiff for a larger sum than was due to the defendant.

The declaration stated that the defendant, on the 19th of November, 1855, by the judgment and consideration of the Court of Common Pleas at Westminster, in a certain action in which the now defendant was the plaintiff and the now plaintiff was the defendant, recovered against the now plaintiff the sum of 265*l.* 9*s.* 6*d.* : that afterwards the now defendant, by means of certain proceedings had under and by virtue of the Common Law Procedure Act, 1854, obtained from certain then debtors of the plaintiff, as garnishees of a certain debt then owing from the said debtors to the plaintiff, the sum of 20*l.* 13*s.* 11*d.*, in payment and satisfaction of so much of the said debt of 265*l.* 9*s.* 6*d.* : that the defendant afterwards *wrongfully and maliciously* sued and prosecuted out of the said court a certain writ of *capias ad satisfaciendum* founded on the said judgment, directed to the sheriff of Hampshire, commanding the said sheriff to take the plaintiff and keep him to satisfy the defendant the said debt of 265*l.* 9*s.* 6*d.*, and afterwards *wrongfully and maliciously, and without any reasonable or probable cause*, endorsed the said writ with directions to levy the whole of the said debt of 265*l.*

9*s.* 6*d.*, and *afterwards wrongfully and maliciously, and without
*468] any reasonable or probable cause, delivered the said writ, so endorsed, to the said sheriff, who afterwards under the same, and within his bailiwick, took the plaintiff by his body, and imprisoned him; and the plaintiff was imprisoned and detained in prison under the said writ to satisfy the defendant the whole of the said sum of 265*l.* 9*s.* 6*d.*, for a long space of time, to wit, from thence until his discharge thereafter mentioned; whereas, at the several times of the said suing out, endorsing, delivering, taking, imprisoning, and detaining in prison, a much less sum than the said sum of 265*l.* 9*s.* 6*d.*, to wit, the sum of 244*l.* 15*s.* 7*d.* and no more was due and owing from the plaintiff upon the said judgment, and the plaintiff, after the said taking, during the said

detention, and long before his discharge thereafter mentioned, was able and willing and offered to pay, and always afterwards during the said detention was able and willing to pay, and afterwards was discharged from imprisonment under the said writ on, and satisfied the said judgment by, payment of the said sum of 244*l.* 15*s.* 7*d.* and no more: and the plaintiff, by reason of the premises, was necessarily put to and incurred divers costs and expenses in and about his maintenance during the said detention, and in and about obtaining his discharge as aforesaid: and the plaintiff claimed 500*l.*

The defendant demurred, on the ground that the declaration did not show that the plaintiff sustained any damage in consequence of the arrest. Joinder.

Manisty, in support of the demurrer.(a)—The *declaration is bad in substance. It states the recovery of the judgment by [469] the defendant against the now plaintiff, and avers that the defendant afterwards wrongfully and maliciously (not saying without reasonable or probable cause) sued out a ca. sa. thereon. It then goes on to aver that the defendant wrongfully and maliciously, and without reasonable or probable cause, endorsed the writ with directions to levy the whole of the debt for which the judgment was signed. But there is no allegation showing that any special damage resulted to the plaintiff from that act. If there were, then, possibly, according to the authority of *Churchill v. Siggers*, 3 Ellis & B. 929 (E. C. L. R. vol. 77), the plaintiff might have had a good cause of action. The plaintiff, however, does not allege that he was at the time able to pay the smaller sum, but merely that, after the taking, and during his detention, he was able and offered to pay the sum actually due upon the judgment. [COCKBURN, C. J.—Surely, from the moment he was in a position to pay the amount which would entitle him to be discharged, he was damaged by the detention.] It is not suggested that the proper sum was not accepted as soon as tendered. If it had been so alleged, the fact might have been traversed.

D. D. Keane, contra, was not called upon. Cur. adv. vult.

COCKBURN, C. J., now delivered the judgment of the court:—

*This was an action for maliciously and without reasonable or probable cause causing the plaintiff to be arrested under a writ [470] of execution issued upon a judgment obtained by the defendant against

(a) The points marked for argument on the part of the defendant, were,—

"1. That the act complained of, viz., causing the plaintiff to be arrested on a writ of ca. sa. endorsed for too much, was not necessarily and per se injurious to the plaintiff, and no ground of action, without special damage.

"2. That the declaration states no special damage: it appears thereby that the plaintiff paid no more than the amount really due: and it does not appear that his imprisonment was prolonged or expenses incurred by him increased by the excessive claim.

"3. That it is not alleged that the writ was issued without probable cause; and it is to be inferred that the defendant had probable cause for issuing it for the full amount of the judgment."

the plaintiff, and upon which the defendant, as the declaration alleges, maliciously and without reasonable or probable cause endorsed a direction to levy the whole amount recovered by the judgment, whereas, a portion of that amount had been previously satisfied: and the declaration proceeds to allege, as damage caused by the arrest for the greater amount, that the plaintiff was, after he was taken, during his detention, and before his discharge, able and willing and offered to pay, and always afterwards during his detention was willing to pay, and was finally discharged from imprisonment upon paying, and discharged the judgment by paying, the smaller sum; and that the plaintiff, by reason of the premises, was necessarily put to and incurred divers costs and expenses in and about his maintenance during the said detention, and in and about obtaining his discharge as aforesaid. To this declaration the defendant demurred; and the case was argued on his behalf by Mr. Manisty, who admitted the authority of the case of *Churchill v. Siggers*, 3 Ellis & B. 929, where the Court of Queen's Bench, in an elaborate judgment, held an action to be maintainable for a malicious arrest without reasonable or probable cause for more than remained due upon the judgment, as in the present case, special damage being shown to have been sustained by the plaintiff in consequence of such arrest. He, however, insisted that such damage was not sufficiently shown by the declaration in the present case.

We are, however, of opinion that special damage is sufficiently alleged. It would not be competent for the plaintiff at the trial to obtain a verdict by proving merely that he was arrested and kept in custody for a greater amount than was due, however improperly endorsed; *471] but he must also prove, that, by reason of the arrest and detention for the larger sum, his imprisonment was prolonged, or the expense of obtaining his discharge increased.

Judgment must, therefore, be for the plaintiff.

Judgment for the plaintiff.

TALBOT v. FISHER. June 1.

Quære, whether an award made upon a reference under the 3d section of the Common Law Procedure Act, 1854, is enforceable by attachment or order under the 1 & 2 Vict. c. 110, s. 13?

THE matters in dispute between the parties in this cause were by a judge's order, under the 3d section of the Common Law Procedure Act, 1854, referred to the arbitration of a county court judge, who made an award in favour of the plaintiff.

Streeten moved to make the order a rule of court.—The 3d section of the 17 & 18 Vict. c. 125, enacts, that, "if it be made to appear, at any time after the issuing of the writ, to the satisfaction of the court

or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way, it shall be lawful for such court or judge, upon such application, if they or he think fit, to decide such matter in a summary way, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the court, or, in country causes, to the judge of any county court, upon such terms as to costs and otherwise as such court or judge shall think reasonable; *and the decision or order of such court or judge, or the award *or certificate of such referee, shall be* [*472 *enforceable by the same process as the finding of a jury upon the matter referred.*] [CRESSWELL, J.—A verdict cannot be enforced by attachment. COCKBURN, C. J.—The language of the section is very precise.] No doubt the plaintiff may sign judgment: but the question is whether he may not also take the course pointed out by the 1 & 2 Vict. c. 110, s. 18.

CRESSWELL, J.—There can be no objection to your taking the first step, by making the order a rule of court. But you must not assume that you receive any encouragement from the court as to the second.

WILLES, J.—Before you draw up your rule, you had better look at the case of *Kendil v. Merrett*, 18 C. B. 173 (E. C. L. R. vol. 86).

Rule absolute.(a)

(a) The 7th section enacts that "the proceedings upon any such arbitration as aforesaid shall, except otherwise directed thereby or by the submission or document authorising the reference, be conducted in like manner, and subject to the same rules and enactments, as to the power of the arbitrator and of the court, the attendance of witnesses, the production of documents, *enforcing or setting aside the award*, and otherwise, as upon a reference made by consent under a rule of court or judge's order."

*The Vestry of the Parish of ST. PANCRAS v. BATTER- [*477
BURY. June 2.

Where a pecuniary obligation is created by a statute, and a remedy expressly given for enforcing it, that remedy must be adopted.

An action in a superior court will not lie against the owner or occupier of a house, for the recovery of his proportion of the expenses of paving a street, under the Metropolis Local Management Act, 13 & 19 Vict. c. 120; but recourse must be had to the remedy pointed out by the 235th section of the act, viz. by a proceeding before two justices.

THE declaration stated, that the first election of vestrymen and auditors of accounts of the parish of St. Pancras, in the county of Middlesex, under the act of the session of parliament holden in the 18th and 19th years of the reign of Queen Victoria, intituled, "An act for the better local management of the metropolis," took place, to wit, on the 15th of November, 1855, according to the provisions of the said act, and the full number of elective vestrymen to be elected at such election according to the provisions of the said act were then

elected, and all things necessary to be done and performed for the due election of such full number according to the provisions of the said act then took place and were performed; and that afterwards, after the commencing and coming into operation of the said act, a certain street in the said parish, called The Prince of Wales's Road, Haverstock Hill, one part of which is called or known as Prince's Terrace, Prince of Wales's Road, and another part of which is called Roxburgh Terrace, Prince of Wales's Road, was a new street laid out or made, not paved to the satisfaction of the plaintiffs, and the owners of the houses forming the greater part of the said street were then desirous of having the same paved either throughout the whole breadth of the carriage-way and footpaths thereof, or some part of such breadth, and the plaintiffs deemed it necessary or expedient that the same should be paved in manner following, that is to say, that the road should be made of twelve inches of hard core or burnt ballast, four inches of pit ballast, and four inches of flints; that the channels should be paved with *478] granite not less than *eighteen inches wide and seven inches deep; that the footways should be paved with 2½ inch York stone, and be kerbed with granite kerb twelve inches by eight inches, upon hard foundation; and that the amount of the estimated expenses of providing and laying such pavement was determined by the surveyor for the time being of the plaintiffs; and that the defendant then was and is the owner of some of the houses forming the said street, that is to say, of the houses known as and numbered Nos. 1, 2, 3, 4, 7, and 11, Prince's Terrace, Prince of Wales's Road, and the house known as and numbered 3 in Roxburgh Terrace aforesaid; and that other persons were and are owners respectively of the other houses forming the said street; and that, by virtue of the said act, the defendant and the said other owners were or might be directed by the plaintiffs to join in paying the sum of money determined by the said surveyor to be the amount of the estimated expenses of providing and laying such payment; and that the plaintiffs considered it just and reasonable to apportion and did apportion the sum of money or expenses so to be paid between the defendant and the said other owners in manner following, that is to say, that the sum to be paid by each owner of the said houses should be the amount of the actual cost of providing and laying so much of such pavement as might be in front of his said house or houses up to the middle of the carriage-way so in front of the same inclusively, together with a sum bearing such a ratio to the whole cost of the intersections as the frontage of his property might bear to the whole length of frontage; and that the value of the materials found on the property of each owner should be allowed in payment of the sum to become due from him on such apportionment; and that, by such apportionment and allowance, which were made before the demand thereinafter mentioned, the sum of 1719*l.* 12*s.* 9*d.* became and was the

*sum due to the plaintiffs, and the sum of 70*l.* 18*s.* 2*d.* became and was the sum which it was the duty of the defendant as [*479 owner of the said houses in Prince's Terrace, and the sum of 12*l.* 16*s.* 11*d.* became and was the sum which it was the duty of the defendant as owner of the said house in Roxburgh Terrace, to pay to the plaintiffs in respect of the said estimated expenses; and that, after the said apportionment and deduction had been made, the said sums of 70*l.* 18*s.* 2*d.* and 12*l.* 16*s.* 11*d.* were demanded of the defendant by the plaintiffs; and the defendant, by reason of the premises, and by force of the said statute, became indebted to the plaintiffs in the said sums of 70*l.* 18*s.* 2*d.* and 12*l.* 16*s.* 11*d.*; and that all things had happened and by the plaintiffs been done to entitle the plaintiffs to have the said sums of 70*l.* 18*s.* 2*d.* and 12*l.* 16*s.* 11*d.* paid to them by the defendant, and to maintain this action; yet that the defendant had not paid the said sums of 70*l.* 18*s.* 2*d.* and 12*l.* 16*s.* 11*d.*, or either of them: and the plaintiffs claimed 88*l.* 15*s.* 1*d.*

The defendant pleaded, that the said street was not a new street laid out or made as alleged. He also demurred, the ground of demurrer stated in the margin being, "that the action is for expenses by statute 18 & 19 Vict. c. 120 directed to be paid, and that a special remedy for enforcing payment thereof is provided by s. 225 of the said act, and therefore an action does not lie for them."

The plaintiffs joined in demurrer.

Lush (with whom was *Shee*, Serjt.), in support of the demurrer.—The declaration in this case is founded upon the 105th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, which enacts, that, "in case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which *such street is situate, be desirous of [*480 having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriage-way and foot-paths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street, shall, on demand, pay to such vestry or board the amount of the *estimated expenses* of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board); and, in case such estimated expenses exceed the actual expenses of such paving, then the difference between such estimated expenses and such actual expenses shall be repaid by the said vestry or board to the owners of houses by whom the said sum of money has been paid; and, in case the said estimated expenses be less than the actual expenses of such paving,

then the owners of the said houses shall, on demand, pay to the said vestry or board such further sum of money as, together with the sum already paid, amounts to such actual expenses." The 217th section enacts that "it shall be lawful for any vestry or district board to require the payment of any costs or expenses which the owners of any premises may be liable to pay under this act, from any person who *then or at any time thereafter* occupies such premises; and the owner shall allow every such occupier to deduct all sums of money which he so pays, or which are levied by distress, out of the rent from time to time becoming due in respect of the said premises, as if the same had been actually paid to such owner as part of such rent." And s. 225 provides the mode of enforcing this obligation. It enacts, that, "in every case where the amount of any damage, costs, or expenses is by *481] this act directed to be *ascertained or recovered in a summary manner, or the amount of any damage, costs, or expenses is by this act directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount shall, in case of dispute, be ascertained and determined by, *and shall be recovered before two justices.*" The question is, whether, in addition to that remedy, the occupier is also liable to *an action*. The inconvenience which would result from such a construction shows that this never could have been intended: if an action will lie, it might be brought at any time within six years, and long after the party had ceased to occupy; whereas, the proceeding before the justices is limited to six months: 11 & 12 Vict. c. 43, s. 11. This question was raised in the Court of Queen's Bench, in the last term, in a case of *The Vestry of St. Pancras v. Morgan*, upon the local acts of this parish, and the court there held that an action would not lie.

*482] *Atherton* (with whom was *D. D. Keane*), *contra*. (a)—"That a duty is created by the 105th section of the 18 & 19 Vict. c. 120, cannot be doubted; and it has repeatedly been decided, that, wherever a statute imposes a duty upon a party to pay a sum of money, a debt is created which is recoverable by an action at law. The 32 G. 3, c. 74, s. 8, imposes certain rates and duties "to be paid by the master or

(a) The points which were marked for argument on the part of the plaintiffs were as follows:—

"1. That the 225th and 226th sections of the 18 & 19 Vict. c. 120 do not apply to *estimated expenses*.

"2. That the 18 & 19 Vict. c. 120 does not provide any remedy for *estimated expenses*:

"3. That the 18 & 19 Vict. c. 120 does not repeal the 57 G. 3, c. 29, and therefore that the vestries acting in the exercise of paving powers under the former act, may act under or upon all or any of the provisions, clauses, powers, and authorities contained in it.

"4. That the moneys sued for may also be recovered in this action by the plaintiffs under the 38th, 120th, and 137th sections of the 57 G. 3, c. 29, the powers, &c., of the commissioners acting under it being transferred to the plaintiffs:

"5. That the effect of the 57 G. 3, is, to enable the commissioners and vestry to recover moneys due to them, by the process which may in a given case seem to them the more expedient; that the 105th section of the 18 & 19 Vict. c. 120 creates a duty or obligation to pay money, and that therefore an action will lie for its recovery; and that the power of distress given by the 225th section is merely a cumulative remedy."

owners' for every ship or vessel of a certain burthen passing from, to, or by Ramsgate: s. 14 declares that "no coasting vessel or fisherman shall pay the duty charged by that act oftener than once in any year:" s. 15 empowers the collectors to distrain every ship and all the tackle, &c., for non-payment of the duties: by s. 16, it was enacted, that, if any master or owner of any ship or vessel should elude or avoid, or attempt to elude or avoid, payment of the duties, he should stand charged and be liable to the payment of the same, and that the same should be levied and recovered from such master or owner by the same method by which fines and penalties imposed by the act were levied and recovered: and by s. 72, penalties and forfeitures were to be levied by action or distress. In *Shepherd v. Hills*, 11 Exch. 55,† the defendant, who was sued for duties under the above act, was the owner of a vessel which several times in the year sailed to Jersey, and brought from thence oysters which the defendant purchased from fishermen there, and which he deposited in beds at Milton: and it was held, that an action would lie on the statute for the recovery of the duties, and that the power of distress was merely a cumulative remedy. Parke, B., there says: "There is no doubt, that, wherever an act of parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the act contains some provision to the *con- [*483 trary.(a) It is true that this statute gives a power of distress, but that is clearly a cumulative remedy." [WILLES, J.—The ground of the decision there was, that the distress was not a perfect remedy.] The question here is, whether the language of the 225th section of the 18 & 19 Vict. c. 120 is sufficient to preclude an action. It is submitted that that section does not confer jurisdiction at all upon the justice in this case. The words "in case of dispute" override everything that follows in that part of the section. To oust the jurisdiction of the superior courts, the language must be clear. The sum made payable by s. 105 is not properly described in s. 225 as "expenses:" the 105th section relates not to "expenses" merely, but "*estimated expenses*." [COCKBURN, C. J.—They become ascertained by s. 225.] If "expenses" would of itself include expenses to be incurred as well as already incurred, the provisions contained in the 158th and 170th sections would have been unnecessary. It cannot be said that the construction here contended for would render the 225th section inoperative; for, there would still remain cases to which it would apply,—the case of carelessly or accidentally breaking lamps, &c.,—s. 207. [WILLES, J., referred to *Stevens v. Jeacocke*, 11 Q. B. 781 (E. C. L. R. vol. 68). By the St. Ives Bay Pilchard Fishery Act, 4 & 5 Vict. c. lvi., it is enacted that certain stems or stations shall be bounded as there defined, and that, in cases of interference by one boat with ano-

(a) See *Anonymous*, 6 Mod. 27; *The Mayor of Swansea v. Hopkins*, 8 M. & W. 201;† *Goody v. Penny*, 9 M. & W. 697.†

ther under specified circumstances, the fish taken by the party interfering shall be forfeited to the party interfered with, and the interfering party shall forfeit 50%. The plaintiff declared in case, setting forth, that, after the statute passed, he was proceeding to take fish in his proper turn and station, and would have taken them, but *the
 *484] defendant prevented him from so doing, by unlawfully and wrongfully throwing a net; and the declaration described the proceeding so as to bring it within the statutory prohibition. On motion in arrest of judgment, it was held that the declaration showed no cause of action, the plaintiff stating no interference with any common law right, and the statute having only imposed a particular penalty for the act done, and having therefore given no general right of action.] It is not sufficient to deprive a party of his common law right to have recourse to a court of law, that the statute has provided another remedy. [COCKBURN, C. J.—Here you have the new duty created by the statute which provides the remedy.] In the *Earl of Shaftesbury v. Russell*, 1 B. & C. 666 (E. C. L. R. vol. 8), 3 D. & R. 84 (E. C. L. R. vol. 16), the 33d section of the 48 G. 3, c. 99, enacting, that, “if any question or difference shall arise upon taking any distress (for assessed taxes), the same shall be determined by the commissioners of taxes,” it was held, that, as the jurisdiction of the superior courts was not expressly taken away, an action at common law was maintainable for a wrongful distress. [WILLIAMS, J.—The question is, whether the remedy is cumulative where the remedy is given by the statute which creates the debt or duty.] A railway act,—5 Vict. sess. 2, c. lxxx., s. 264,—imposed a penalty on the company for the interruption of any road, and, in the case of a private road, made the penalty “payable to the owner thereof:” the same act (s. 357) enacted that any penalty imposed thereby, the recovery of which was not otherwise provided for, might be recovered by summary proceeding, upon complaint before two or more justices: and it was held,—in *Collinson v. The Newcastle and Darlington Railway Company*, 1 Car. & K. 546 (E. C. L. R. vol. 47),—that this did not bar the party entitled from his remedy by action at law. [CRESSWELL, J.—The words in s. 225 of the act under consideration are “shall be recovered,” not “recoverable.”] So, in *the
 *485] 5 & 6 Vict. c. lxxx., s. 357, the words were “may be recovered by summary proceeding,” &c.

Lush, in reply.—There are many cases where “may,” in a statute, has been construed “shall;” but “shall” has never been held to give an option. This is of all others a case in which it is least likely that the legislature would intend to give a cumulative remedy. There may be fifty owners assessed,—are there to be fifty actions to recover the estimated expenses? And, should the estimate be too large, are there to be fifty actions to recover back the excess? Again, the liability is imposed upon every occupier at the time, or who may come in after—

wards: it clearly could not have been the intention of the legislature to let in such a flood of litigation. In *Shepherd v. Hills*, 11 Exch. 55,† it is difficult to see how any question could have arisen, seeing that the very same section (s. 72) which gave the power to distrain also gave the deputy master a right to bring an action. A public local act,—1 Vict. c. xcvi.,—for making a railway in Ireland, provided that, if any proprietor of shares should refuse to pay a call, it should be lawful for the company to sue for it in any of the Queen's courts of record in Dublin, and gave a general form of declaration: and it was held, that, the debt and the remedy being created by the statute, the company were bound to pursue the remedy pointed out by it, and could not bring an action for a call, and declare in the general form, in an English court: *The Dundalk Western Railway Company v. Tapster*, 1 Q. B. 667 (E. C. L. R. vol. 41). [WILLES, J.—I think that case has been somewhat doubted.] It is not necessary to rely upon it here. The 216th section throws some light upon the construction of the 225th, if any were wanted. By that section it is enacted, that, in all cases where any vestry or district board is authorized to order any costs, charges, or expenses to be paid by private parties, it *shall be lawful for [*486 such vestry or district board to order and accept payment of such costs, charges, and expenses, together with interest thereon after a rate not exceeding 5*l.* for the hundred by the year, by instalments, within such period, not exceeding twenty years in each case, as they may determine, the amount thereof to be recoverable in the same manner as other expenses are to be recovered under this act." It is said that the sum sought to be recovered in this action is not "expenses," within the meaning of the 225th section: but the language of the clause is as large as possible.

COCKBURN, C. J.—I am of opinion, that, under the circumstances here stated, no action will lie, but that the proper remedy for the recovery of the expenses in question, is, by the mode pointed out in the 225th section of the statute. Where an act of parliament creates a duty or obligation, and gives a remedy for a breach of it by a peculiar proceeding, a question arises whether the remedy so provided is the only one to be had recourse to, or whether it is cumulative. But here the language of the 225th section of the statute is very peremptory: it enacts, that, in every case where the amount of any damage, costs, or expenses is by this act directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, the amount shall, in case of dispute, be ascertained and determined by, and shall be recovered before, two justices." The words are "shall be recovered." The act having created the pecuniary obligation, points out in the most positive and peremptory language the mode in which it shall be enforced. I think it is clear that the legislature intended that the summary proceeding thus pointed out should be the

only one. And one can readily understand why this should be so. It may be that there are a hundred houses the owners or occupiers of *487] which are *called upon to contribute to the expenses of paving a street, and there might be numerous disputes among the individuals interested. No legal question of any nicety or difficulty could well arise to call for the intervention of a court and jury: the only disputes which could arise, would be as to the amount to be contributed by each. I cannot conceive a tribunal better qualified to deal with such matters than the one chosen by the legislature. I think we shall best give effect to the intention of the act by holding that the expenses in question are not recoverable by action.

CRESSWELL, J.—I also am of opinion that the pecuniary obligation and the mode of enforcing it are indissolubly united by the statute, and cannot be severed.

WILLIAMS, J.—I am of the same opinion, and for the same reasons. This belongs to that class of cases where the act at once imposes the duty and directs the remedy. The case of *Shepherd v. Hills*, 11 Exch. 65,† at first sight seems to be at variance: but, in that case, the remedy did not cover the whole right.

WILLES, J., concurred.

Judgment for the defendant.

The law seems well settled in the United States as it is in England, that when a right, with its appropriate remedy, existed at common law, if a statute gives a new remedy in affirmative words, or rather without a negative express or implied, this does not take away the common law remedy: *Crittenden v. Wilson*, 5 Cowen, 165; *Gooch v. Stephenson*, 1 Shep. 371; *The State v. Norton*, 3 Zabriskie, 33. *Renwick v. Morris*, 7 Hill, 575; *Bessett v. Carleton*, 32 Maine, 553; *Smith v. Lockwood*, 13 Barb. 209; *Thurston v. Prentiss*, 1 Manning, 469. Where a statute authorizes an injury and provides a remedy for it, no action will lie at common law, as where land is taken for roads: *Sudbury Meadows v. Middlesex Canal*, 23 Pick. 36; *Dodge v. Essex*, 3 Met. 380.

When a statute creates an offence and does not prescribe a remedy, the proper common law remedy may be employed: *Colburn v. Swett*, 1 Met. 233; *Eller v. Bernis*, *Ibid.* 599; *Van Hook v. Whitlock*, 3 Edw. Ch. 304. But if the right be conferred or created by the statute, the remedy prescribed by the statute and no other can be pursued: *Almy v. Harris*, 5 Johns. 175; *Lang v. Scott*, 1 Blackf. 405;

***WICKENS v. GEORGE STEEL and ALEXANDER STEEL. May 22. [488**

The 37th section of the Common Law Procedure Act, 1852, which enables the court or a judge, in the case of the misjoinder of a defendant in an action on contract, to amend such misjoinder "as a variance at the trial," does not apply to a case where the party whose name is sought to be expunged has been joined, not by mistake or inadvertence, but designedly for the purpose of seeking to fix him with liability: and an application to amend under that section cannot be entertained after the verdict has been returned.

The 222d section does not apply to the case of a misjoinder of parties.

THIS was an action for work and labour, &c., as an attorney in the conduct of a suit upon the alleged retainer of both defendants, against the South Eastern Railway Company, in which the plaintiffs were nonsuited: see 16 C. B. 550 (E. C. L. R. vol. 81).

The cause was tried before Cresswell, J., at the sittings after last Michaelmas Term. The evidence showed a retainer by the defendant Alexander only, and the jury found that George,—who was a man of substance, and who had been held to bail by the plaintiff when about to proceed to Australia,—had been improperly made a party to the action against the railway company, and accordingly returned a verdict for him and against Alexander only; whereupon the learned judge said that that was in point of law a verdict for both defendants, and he directed it to be so entered.

Before the entry of the verdict, however, the plaintiff's counsel asked the learned judge to amend the record by striking out the name of George Steel. The learned judge thought he had no power to do so, but he reserved leave to the plaintiff to move to enter the verdict against Alexander Steel, if the court should be of opinion that the amendment ought to have been allowed.

Hawkins, accordingly, in Hilary Term last, obtained a rule calling upon the defendants to show cause why the record and all other necessary proceedings in this cause should not be amended by striking out the name of George Steel as a defendant, and why the verdict found for the defendants should not be set aside, and instead thereof a verdict entered for the plaintiff against *the defendant [489 Alexander Steel for 182l. 19s. 10d.; or why there should not be a new trial, on the ground that the defendant Alexander Steel was liable, and to enable the plaintiff to amend the record and other necessary proceedings as aforesaid, by which the plaintiff might recover against him; and why the said record and other proceedings should not be amended accordingly.

W. G. Harrison now showed cause.—The learned judge had no power to make the amendment proposed, or to reserve the point. The amendment could only have been made under the 37th or the 222d section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76. The latter section is clearly inapplicable here; for, there is no "defect

or error" in the proceeding, nor was the amendment "necessary for the purpose of determining in the existing suit the real question in controversy between the parties." And, in *Robinson v. Doyle*, 3 Ellis & B. 896, it was distinctly held, that, where, in an action of contract, one of several defendants appears at the trial not to be liable, the proper course for the plaintiff, under the Common Law Procedure Act, 1852, is, to apply *at the trial* for an amendment under s. 37, and that the misjoinder is not such a defect or error as can be amended *after the trial* by the court in banc, under s. 222. The 37th section enacts that "it shall and may be lawful for the court or a judge, in the case of the joinder of too many defendants in any action or contract, at any time before the trial of such cause, to order that the name or names of one or more of such defendants be struck out, if it shall appear to such court or judge that injustice will not be done by such amendment; and the amendment shall be made upon such terms as the court or judge by whom such amendment is made shall think proper; and, in case it shall *490] appear at the trial of any action on contract that there has *been a misjoinder of defendants, such misjoinder may be amended *as a variance, at the trial*, in like manner as the misjoinder of plaintiffs has been hereinbefore (s. 35) directed to be amended, and upon such terms as the court, or judge, or other presiding officer by whom such amendment is made, shall think proper." Under the former statute, 3 & 4 W. 4, c. 42, s. 23, no amendment could be made except during the trial *and before verdict*: *Brashier v. Jackson*, 6 M. & W. 549.†(a) The policy of the statutes was, to leave the whole matter to be disposed of by the judge on the spot, seeing that he would be best able to judge of the propriety of allowing or withholding the amendment. Where the judge refuses to allow an amendment, the court clearly will not interfere.(b) [COCKBURN, C. J.—The course here adopted is the more convenient one. It is in effect the same as if the learned judge allows the amendment at the trial, leaving the other side to move.] At all events, the amendment here sought could not be granted *after verdict*. The judge had no power to divest the defendants of the right which the verdict had given them. The plaintiff took his chance with the jury; and, having lost the verdict as against both defendants, cannot be permitted afterwards to insist upon the separate liability of one of them. [COCKBURN, C. J.—The "trial" is, from the swearing of the jury to the finding of the verdict. The amendment here was not asked for until the trial was over.]

Hawkins, in support of the rule.—The application was early enough if made before the verdict was recorded. The statute 22 & 23 Car. 2, c. 9, s. 136, enacted, that, "in all actions of trespass, assault and

(a) And see *Doe d. Bennett v. Long*, 9 Car. & P. 773 (E. C. L. R. vol. 28).

(b) See *Jenkins v. Phillips*, 9 Car. & P. 766 (E. C. L. R. vol. 38); *Lucas v. Beale*, 10 C. B. 730 (E. C. L. R. vol. 70).

battery, and other personal actions, wherein the judge *at the trial of the *cause* should not find and certify under his hand upon the back [*491 of the record that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury should find the damages to be under the value of 40s., should not recover or obtain more costs of suit than the damages so found should amount unto," &c. Under that statute, the certificate must of necessity be given after the trial is over. The same words in the 37th section of the Common Law Procedure Act, 1852, must receive the same interpretation. [CRESSWELL, J.—If I had made the amendment as prayed, what would have happened next?] The verdict would have been recorded against Alexander Steel. [CRESSWELL, J.—The jury had found no verdict against Alexander.] Before the application for the amendment, there had been no perfect finding. [CRESSWELL, J.—The jury had found that which I told them amounted to a verdict for both defendants.] Substantial justice will be done by the amendment prayed. [CRESSWELL, J.—The allowance of the amendment would have worked injustice. The defendant Alexander had nothing: George was a man of some substance, and, as he was about to sail for Australia, the plaintiff caused him to be arrested; and now the plaintiff wants to relieve himself from the consequences of his hasty proceeding.] The plaintiff failed to obtain a verdict against George merely because he was not in a condition to prove a joint retainer by the two. [COCKBURN, C. J.—I do not think this is a case for an amendment. Throughout the trial, the plaintiff persisted in his attempt to obtain a verdict against both defendants; and it was only when he failed in that attempt that he sought to shift his ground. In *Robson v. Doyle*, there was no application to amend at the trial. In *Johnson v. Goslett*, 18 C. B. 728 (E. C. L. R. vol. 86), A. sued *B., C., D., E., F., G., and H., in an action of contract; H. [*492 suffered judgment by default; and the evidence failed as against F. and G.: and it was held that it was competent to the judge at *Nisi Prius* to amend the record, under s. 37 of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, by striking out the names of F. and G., and a proper case for the exercise of his discretion. [COCKBURN, C. J.—The 37th section makes the misjoinder amendable *as a variance* at the trial. Who ever heard of an amendment of a variance *after verdict*? Have you any authority for it?] There is no case precisely in point: but it is submitted that the proposed amendment was warranted by the statute, and in truth is no more than was done in *Johnson v. Goslett*. [COCKBURN, C. J.—There, the amendment was asked at the proper time; and, though the report in 18 C. B. 728 (E. C. L. R. vol. 86), does not in terms state so, the question of amendment must have been

reserved for the court.(a) Here, the case went to the jury upon the very issue the parties went down to try, viz. whether there was a joint retainer by the two defendants.] At all events, assuming that the application for the amendment was too late, the court will permit the rule to be made absolute in the other alternative, in order that substantial justice may be done between the parties.

COCKBURN, C. J.—I am of opinion that this rule should be discharged. I think the 222d section of the Common Law Procedure Act, 1852, has no application whatever to this case, and that the whole question turns upon the 37th section, which enacts, that, “in case it shall appear at the trial of any action on contract that there has been *493] a misjoinder of defendants, such *misjoinder may be amended (by striking out the name or names of one or more of such defendants) as a variance at the trial, in like manner as the misjoinder of plaintiffs has been hereinbefore (in s. 85) directed to be amended, and upon such terms as the court, or judge or other presiding officer by whom such amendment is made, shall think proper.” This the judge is to do, “if it shall appear to him that injustice will not be done by such amendment.” This section evidently is designed to meet the case of a defendant who has been erroneously joined; and such erroneous misjoinder is put upon the footing of a variance: but I think it clearly was not intended to apply to a case where a party has been joined as a defendant, not by mistake, but intentionally and with the deliberate purpose of trying to fix him with liability,—as was done here. Down to the very last moment, the plaintiff’s counsel insisted that George was properly made a defendant; and, the jury having, by their verdict, negatived his liability, he then sought to have his name expunged from the record. I am clearly of opinion that the 37th section was never intended to apply to a case where the question of the party’s liability has been left to the jury, and the verdict has passed for him. But, assuming that that section did apply to such a case, I think this is not an occasion in which the discretion of the judge to allow the amendment could properly be exercised. To allow an amendment under such circumstances would, I think, lead to very dangerous consequences: it would be the means of causing parties to be improperly made defendants in the hope of their being fixed with a liability for which there was no foundation. Where a man has been made a defendant through inadvertence or misconception, and in the course of the trial the evidence against him turns out to be insufficient, and the plaintiff’s *494] counsel makes a *bonâ fide* application to the judge to strike out his name on that account, that may be a very fit case for the exercise of the judge’s discretion under the statute. But, where the plaintiff’s counsel deliberately goes to the jury with a view to obtaining a verdict against all the defendants, and fails as against one, I think

(a) The report in 25 Law Journ. C. P. 274, does contain such a statement.

the case is not one in which he has a right to ask for the exercise of the judge's discretionary power in his favour. Independently, therefore, of the question as to the power of the court to allow this amendment, I think this was not a case for it.

As to the other branch of the rule, I must confess I see no ground for a new trial. The verdict as it stands is perfectly right. The defendant George Steel is entitled to that verdict. By declining to grant a new trial, we shall not put the plaintiff into a situation in which he will be deprived of the opportunity of obtaining justice against the other defendant, Alexander Steel. But, if we were to make the rule absolute, we might be putting George Steel in a worse position than that in which he now stands.

The rest of the court concurring,

Rule discharged.

***SARAH EMMA DUNSTON v. PATERSON. June 5. [*495**

The sheriff having a writ commanding him to arrest A., took B., who represented herself to be the person named in the writ:—Held, that, though B. might be estopped by her misrepresentation from suing the sheriff for the original taking, he could not justify detaining her after he had notice that she was not the real party.

THE declaration stated that the defendant assaulted the plaintiff, and arrested her, and caused her to be conveyed in custody along certain highways a distance of forty miles to gaol, and kept her in custody in such gaol for the space of eight weeks then next following; and, the plaintiff then being kept and detained in custody in the said gaol by the defendant, and certain persons, to wit, John Dunston and others to the plaintiff unknown, being desirous of examining the plaintiff in certain suits then pending in the High Court of Chancery, and having issued a writ of habeas corpus ad testificandum, the defendant thereupon caused the plaintiff to be removed in custody from the said gaol, and conveyed in such custody from the said gaol to the examiner's office of the said High Court of Chancery, a distance of forty miles, and there to be detained for the space of two days; and the defendant thereupon caused her to be conveyed from the said examiner's office back to the said gaol, and thereupon again detained her in custody in such gaol for a further period of ten days; and, during the several times aforesaid, the plaintiff was prevented from obtaining her means of, and was removed from her home and livelihood; and, during the times of her imprisonment in the said gaol, she was kept upon weak, improper, and insufficient food; and, by means of all the premises aforesaid, the plaintiff was greatly disordered and weakened in body and mind, and underwent great pain, and was otherwise injured in her credit and circumstances: and the plaintiff claimed 500*l*.

The defendant pleaded,—first, not guilty.

*496] *Secondly,—to so much of the declaration as charged him with assaulting and arresting the plaintiff, and keeping her in custody in the said gaol as above mentioned,—that, before the committing of either of the alleged trespasses, a certain writ of our Lady the Queen, of *capias ad satisfaciendum*, directed to the sheriff of the county of Kent, to wit, the defendant, was issued out of the Court of Exchequer at Westminster, by which said writ our Lady the Queen commanded the said sheriff to take the body of *the plaintiff*, if she should be found in his bailiwick, and her safely keep, so that he might have her body before the barons of her Majesty's said Exchequer at Westminster immediately after the execution thereof, to satisfy one Hugh Hill the sum of 37*l.* 19*s.* 4*d.*, which he had lately in the said court recovered against the plaintiff, together with interest, as in the said writ was mentioned; which said writ was afterwards, and before the said committing of either of the trespasses, duly endorsed and delivered to the defendant as and then being such sheriff as aforesaid, for execution in due form of law; and thereupon afterwards, and whilst the said writ was in full force, and before the return of the said writ, and within the said bailiwick of the said sheriff, the defendant, so being and as such sheriff as aforesaid, did by virtue of and under the said writ, and in all respects according to the exigency thereof, take and arrest the plaintiff by her body, and did convey her in custody to gaol, and did keep her in custody in such gaol, and in the said county, the said gaol being the fit and proper place to which to convey and in which to detain the plaintiff under the said writ,—which were the trespasses by that plea pleaded to.

Thirdly,—to so much of the declaration as was not by the second plea pleaded to,—that theretofore, and before the committing of the trespasses by that plea *pleaded to, or any part thereof, the plaintiff *497] was in the lawful custody of the defendant under the writ in the said second plea mentioned; and thereupon, and whilst she so lawfully remained in such custody, a writ of our Lady the Queen, called a *habeas corpus ad testificandum*, was duly issued out and by the authority of the High Court of Chancery, to wit, in the suits in the declaration mentioned, and directed to the sheriff of Kent, to wit, the defendant, whereby our said Lady the Queen commanded the said sheriff, the defendant then being such sheriff as aforesaid, that he should on Tuesday the 8d day of February, 1857, at twelve of the clock at noon, bring before Kenyon Stevens Parker, Esq., one of the examiners of the said Court of Chancery, the body of the plaintiff, to be examined as a witness in such suits, and afterwards, if necessary, from time to time, until her said examination had been completed; and thereof he the said sheriff should fail not, and that he should take the said writ with him: and afterwards, and before the committing of the said trespasses by that plea pleaded to, or any part thereof, the said last-mentioned writ was

July delivered to the sheriff, that is to say, the defendant, he then being such sheriff as aforesaid; and the defendant afterwards, and whilst the plaintiff was in the lawful custody of the defendant, as and being such sheriff as aforesaid, in obedience thereto, did cause the plaintiff to be removed in custody from the said gaol to the said examiner's office of the said High Court of Chancery, and there for the purpose aforesaid to be necessarily detained as in the declaration mentioned, in all respects according to the exigency of the same writ, and not otherwise, and did afterwards necessarily cause her to be conveyed from the examiners' office back to the said gaol, in all respects as aforesaid, according to such exigency and his duty as such sheriff as aforesaid, and not otherwise,—which were the trespasses by that plea pleaded to.

*Fourth plea,—to so much of the declaration as was by the second plea pleaded to,—that, before either of the said trespasses, a certain writ of our Lady the Queen, called a *capias ad satisfaciendum*, directed to the sheriff of the county of Kent, to wit, the defendant, was issued out of Her Majesty's Court of Exchequer at Westminster, by which writ our Lady the Queen commanded the defendant, as and being such sheriff as aforesaid, to take the body of one Emily M. Dunston, if she should be found in his bailiwick, and her safely keep, so that he might have her body before the barons of Her Majesty's Exchequer at Westminster immediately after the execution thereof, to satisfy one Hugh Hill 37*l.* 19*s.* 4*d.*, which he had lately in the said court recovered against the said Emily M. Dunston, together with interest as in that writ mentioned; and thereupon, afterwards, and whilst the said writ was in full force, and before the return thereof, and within the said bailiwick of the said sheriff, the plaintiff having notice of all the premises aforesaid, and especially that the defendant, as and being such sheriff, was seeking to arrest the said Emily M. Dunston under and by virtue and according to the exigency of the said writ, asserted, represented, and stated to the defendant, so then being such sheriff as aforesaid, and with the view and intention of procuring him then and there, as such sheriff, to arrest the plaintiff under and by virtue of the said writ, as and for and being, *and she then asserting, representing, and stating that she the plaintiff was, the said Emily M. Dunston, and the person against whom the said writ had so issued*; and she, the plaintiff, then and there, by the aforesaid assertions, representations, and statements (the defendant then *and still* believing them to be true), caused and procured the defendant, as and so being such sheriff, then and there, under and by virtue of the said writ, to, and he did accordingly, according to law, thereunder take *and arrest* the plaintiff by her body, and convey her in custody to gaol, and did keep her in custody in such gaol and in the said county, the said gaol being the fit and proper place to which to convey and in which

to detain the plaintiff under the said writ,—which were the trespasses by that plea pleaded to.

Fifthly,—to so much of the declaration as was not pleaded to by the fourth plea,—that theretofore, and before the committing of the grievances by that plea pleaded to, or any part thereof, the plaintiff was in the lawful custody of the defendant under the writ and circumstances in the said fourth plea mentioned, and not otherwise; and thereupon, and whilst she so lawfully remained in such custody, the writ of habeas corpus of our Lady the Queen in the third plea mentioned was duly issued out of and by the authority of the said Court of Chancery, to wit, in the suits therein mentioned, and directed to the sheriff of Kent, to wit, the defendant, in all respects as in the third plea in that behalf mentioned, whereby he was commanded as in the said third plea mentioned; and thereupon, afterwards, the defendant, under and by virtue of such writ, did commit the trespasses by that plea pleaded to, as and in manner in the said third plea mentioned, and not otherwise,—which were the trespasses by that plea pleaded to.

The plaintiff joined issue on the defendant's pleas.

And, for a second replication to the fourth and fifth pleas, the plaintiff said, that, after the assertions, representations, and statements in the said fourth and fifth pleas mentioned, *the plaintiff informed the defendant, and he then had knowledge and notice, that the plaintiff was not the said Emily M. Dunston mentioned in the said writ* in the said fourth and fifth pleas mentioned; and that the plaintiff sued the defendant for the trespasses in the declaration mentioned, and which were committed after the defendant had such knowledge and notice as aforesaid.

*500] *Rejoinder to the second replication to the fourth and fifth pleas,—that the plaintiff did not inform the defendant, nor had he knowledge and notice, nor was he guilty as in such replication mentioned.

Second rejoinder to the second replication,—that, at the time of the alleged knowledge and notice, the plaintiff was lawfully in the defendant's custody in manner and under the circumstances in the said fourth and fifth pleas mentioned; and that the trespasses alleged to have been committed after the said alleged knowledge and notice, were and are the continued keeping of the plaintiff in custody under the said writ of *capias ad satisfaciendura* and other acts lawfully committed by the defendant under and by virtue of the writ of habeas corpus in the fifth plea mentioned, in manner and form as in the said fifth and sixth pleas mentioned, and not otherwise.

The plaintiff joined issue on the rejoinders to the second replication; and he demurred to the second rejoinder, the ground stated in the margin being, "that the defendant was not excused nor justified in

keeping the plaintiff in custody under the alleged writ, after he knew that she was not the defendant named therein." Joinder.

Woollett, in support of the demurrer.(a)—The plea is clearly bad; the original taking was unlawful. The sheriff is bound at his peril to know that he arrests the right party: *Coote v. Lighworth*, F. Moore, 457. In *Thurbane's Case*, Hardres, 323, a commission of rebellion issued against one Thurbane, of Gowtherst, in Kent, and *one Green appeared before the commissioners and affirmed himself to [*501 be the person, whereupon they apprehended him by virtue of their commission; but he made resistance, and snatched the commission from them, and tore it in pieces. Upon affidavit made of this matter, an attachment was prayed against Green; and Hale, C. B., said: "If a wrong man be taken, though he affirm himself to be the person against whom the commission is awarded, yet, the commissioners having no warrant to take him by their commission, his affirming himself to be the person will not excuse them in false imprisonment; as hath been held upon the execution of a *capias*." These cases have never been overruled: on the contrary, in *Freeman v. Cooke*, 18 Law Journ. Exch. 114, Parke, B., referring to the last-mentioned case, says,— "The case in *Moore*, is sanctioned by Com. Dig. *Imprisonment* (L. 2), and it always has been the opinion of the profession that it is law."(b) It may be that the plaintiff, having once admitted herself to be the party against whom the writ was issued, would be estopped from saying that she was wrongfully arrested in the first instance; but the new assignment shows that the sheriff detained her in custody after he had notice and knowledge that she was not the right party: and *Smith v. Eggington*, 7 Ad. & E. 167 (E. C. L. R. vol. 34), 2 N. & P. 143, 6 Dowl. P. C. 38, shows that a new assignment was the proper way of raising the question. [COCKBURN, C. J.—In order to insure the escape of the person named in the writ, the now plaintiff represents to the officer that she is that person; and now she turns round and says that she has been wrongfully arrested. Is the sheriff, under the circumstances, bound to receive her assertion?] The new assignment distinctly avers that the sheriff had *knowledge* that she was not the person named in the writ. [WILLIAMS, J.—How do you get *over the doctrine of *Pickard v. Sears*, 6 Ad. & E. 469 (E. C. L. R. vol. 33), 2 N. & P. 488, *Grigg v. Wells*, 10 Ad. & E. 90 [*502 (E. C. L. R. vol. 37), 2 P. & D. 296, and *Freeman v. Cooke*, 2 Exch. 654?†] The doctrine of those cases does not apply here. [WILLES, J.—Those estoppels only justify the acts which the conduct of the party induces.] That is the true distinction. The sheriff can have no lawful

(a) The points marked for argument on the part of the plaintiff, were,—

"1. That the defendant's second rejoinder is bad in substance.

"2. That the defendant was not justified in keeping the plaintiff in custody under the writ after he knew that she was not the defendant named in the writ."

(b) See 2 Exch. 654, 656.†

right to detain the plaintiff; for, if he has, he may justify imprisoning her for life.

The court called on

Raymond, for the defendant.(a)—The plaintiff has been guilty of a gross contempt of the process of the court, and has no right to complain *503] of the inconvenience *which her own misconduct has brought upon her. Upon the record it does not appear that she is the wrong person. The fourth plea states that a writ was delivered to the sheriff, commanding him to take the body of one Emily M. Dunston; that the plaintiff asserted, represented, and stated to the defendant, with the view and intention of procuring him to arrest her under the writ as and for Emily M. Dunston, that she was the said Emily M. Dunston, *and the person against whom the writ had so issued*; and that she by such assertions, representations, and statements (the defendant then and still believing them to be true), caused and procured the defendant to arrest her. To this the plaintiff replies, that, after the assertions, representations, and statements in the plea mentioned, she informed the defendant, and he then had knowledge and notice, that the plaintiff was not the said Emily M. Dunston mentioned in the writ in the said fourth plea. That is quite consistent with her being the person against whom the writ issued. [CRESSWELL, J.—Who, then, is “the said Emily M. Dunston in the plea mentioned?”] It is not distinctly alleged that the defendant had knowledge or notice that the plaintiff was not the said Emily M. Dunston mentioned in the writ. If it had been, that might do: but all the knowledge and notice alleged here, is, that which was derived from *her* statement. That clearly is not enough. [CRESSWELL, J.—Suppose issue had been taken upon that allegation, and it was proved at the trial that the plaintiff had told the defendant after the arrest that she was not the right person, and he had answered,—“Oh, yes: I know that very well; but, as you

(a) The points marked for argument on the part of the defendant, were,—

“1. That, under the circumstances appearing on the record, he was justified in taking and detaining the plaintiff in the manner there shown:

“2. That, at all events, for everything that was done under the authority of the writ of habeas corpus he was protected:

“3. That the plaintiff was estopped from disputing her identity with the real defendant in the action of *Hill v. Dunston*:

“4. That the second replication was bad in substance, for not showing when for the first time the plaintiff gave the defendant the information therein alleged:

“5. That the information stated in the said replication was not to be relied on, and could impart no knowledge:

“6. That the second replication ought to have shown by averment, and did not, that the plaintiff’s false representations did not operate to prevent the capture of Emily M. Dunston, and to have negatived all other damage capable of arising out of such false representations to the defendant and the plaintiff in the action of *Hill v. Dunston*.

“7. That, in the absence of such averment, damage to the defendant and the plaintiff *Hill* was to be assumed:

“8. That it was consistent with such replication that the plaintiff was the real defendant:

“9. That, at all events, such replication afforded no answer to the fifth plea, inasmuch as the writ of habeas corpus was a clear justification of all to which the plea was pleaded.”

tricked me, I will not let you go,"—would not that be very good evidence of knowledge and notice?] Possibly it might. But the main point is this,—that, as between these parties, the plaintiff has conclusively estopped herself from saying that she is not the Emily M. Dunston mentioned in the writ. The case *of *Coote v. Lighthorth*, F. Moore, 457, does not amount to much: there, [*504 there was a mere acknowledgment by the party that his name was the same. Here, that which was done by the plaintiff was done with the intention of inducing the sheriff to take her. *Thurbane's Case*, Hardr. 323, is a mere dictum, which is not much advanced by the observation of Parke B., in *Freeman v. Cooke*. [COCKBURN, C. J.—Do you insist, that, because the plaintiff has misled the defendant, he is entitled to keep her in custody until she pays Emily M. Dunston's debt?] The argument certainly must go that length. [WILLES, J.—Suppose the real Emily M. Dunston were now taken, would the sheriff be entitled to detain both?] Yes. [WILLES, J.—Or if the real party were taken and paid the amount, might the sheriff still hold the present plaintiff?] Not after the debt was paid. But she is absolutely and perpetually estopped from denying her identity. [COCKBURN, C. J.—The sheriff does not appear to have sustained any prejudice by what has been done.] He was induced to relax his efforts to capture the real party. Suppose he had been ruled to return the writ. [COCKBURN, C. J.—It may be that the sheriff would have a remedy against the plaintiff for any injury he may have sustained through the misrepresentation: but urely he can have no right to detain her in custody indefinitely.] The rule laid down by the Court of Queen's Bench in *Pickard v. Sears* and *Gregg v. Wells*, and substantially adopted by the Court of Exchequer in *Freeman v. Cooke*,—that, "where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time,"—is precisely applicable here. In *Fisher v. Magnay*, 6 Scott, N. R. 588, 5 M. & G. 778 (E. C. L. R. vol. 44), where a party was sued by a wrong name, *and suffered judgment to go against him, without attempting to rectify the mistake, it was held that he could not [*505 afterwards, in an action against the sheriff for false imprisonment, complain of an execution issued against him by that name. In giving judgment, the court there put it upon the ground of estoppel. In *Morgans v. Bridges*, 1 B. & Ald. 647, the sheriff, having a writ against G. B., arrested M. B., who was the real debtor, and at the time of contracting the debt had represented himself as G. B.: and it was held that the sheriff, having been informed of these circumstances while he had the real debtor in his custody, was not bound to detain him. Lord Ellenborough there said: Where a party has misrepresented

himself, and taken a name which does not belong to him, it is not permitted to him to take advantage of his own wrongful act, so as to enable him to avoid the consequences of it: for, a mistake induced by his own affirmation cannot give him a right of action. If, therefore, the sheriff had in this case detained Maurice Barnett, it appears to me that he might have justified it, in case that person had brought an action for the false imprisonment against him. I remember a case to this effect before Lord Loughborough, where a person had obtruded himself instead of another on the sheriff's officers, and afterwards, having been arrested, brought an action against them; and Lord Loughborough held that it would not lie. I dissented at that time from the decision; but, on fuller consideration, I have been satisfied that that case was rightly determined." And Abbott, J., said: "The question made at the trial was, whether the sheriff might not under this warrant lawfully have arrested and detained Maurice Barnett. I then thought that he might, and I think so still; and that he might have justified in an action for the false imprisonment, by averring that the *506] party arrested was called Godfrey; for, *the name by which he has designated himself cannot as against him be considered other than his true name*; and so the arrest would not be by a mistaken name, as in the case cited from Foster, 312." [COCKBURN, C. J.—That would go to the original arrest.] It is admitted here that the original arrest was lawful: the only thing to make it, on the subsequent detention, unlawful is the counter-statement of the plaintiff. [COCKBURN, C. J.—It is impossible to say that the custody was lawful: but it may be that the plaintiff is by her conduct precluded from setting up its illegality as a ground of action.] Erle, J., in delivering the judgment of the court in *Walley v. M'Connell*, 13 Q. B. 903, 912 (E. C. L. R. vol. 66), says, that, "if a defendant so acts as to be concluded from denying that he is the defendant, final process against him may be valid, although not against him by his real name, but by the name that he must be taken to have adopted." [COCKBURN, C. J.—In that case the process went against the individual intended, and was executed upon the plaintiff in the mistaken belief that he was that person.] The only difference between that case and the present, is, that there the estoppel begins a little earlier. *Crawford v. Satchwell*, 2 Stra. 1218, is also a strong authority in favour of the defendant. In *Howard v. Hudson*, 2 Ellis & B. 1, 10 (E. C. L. R. vol. 75), Lord Campbell says: "I accede to the rule laid down in *Pickard v. Sears* and in *Freeman v. Cooke*. If a party wilfully makes a misrepresentation to another, meaning it to be acted upon, and it is so acted upon, that gives rise to what is called an estoppel. It is not quite properly so called; but it operates as a bar to receiving evidence contrary to that representation as between those parties." [CRESSWELL, J.—The party making the representation is estopped with reference to the act done upon the faith

of the representation. So, here, the plaintiff is estopped as to the original taking. But it must be confined to that; otherwise you must *contend that the succeeding sheriff would be bound to keep the plaintiff in custody.] In *Ex parte Leslie*, 27 *Law Times*, 525, a [507 bankrupt having contracted debts upon a false representation of his being a trader, was held to be afterwards estopped from denying that he was at the time a trader. In *Tyerman v. Smith*, 6 *Ellis & B.* 719 (*E. C. L. R.* vol. 88), it was held, that, on a compulsory reference under the *Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), it is no objection to entering up judgment on the award, under s. 3, that the award was made more than three months after the arbitrator entered on the reference, though the order of reference named no time, and no written consent for enlarging the time had been given by the parties, if it appeared that the parties had, within a month before the making of the award, acted upon the reference as still subsisting,—such acting estopping them from saying that the circumstances necessary to give jurisdiction to the arbitrator did not exist. So, in *Andrews v. Elliott*, 5 *Ellis & B.* 502 (*E. C. L. R.* vol. 85), a cause was tried without a jury, before a commissioner at *Nisi Prius*, not a judge of the superior courts. The parties had consented; and the judge in open court sanctioned this course; but there was neither a judge's order nor a consent in writing. The unsuccessful party having moved for a new trial, it was held, that, the commissioner having general jurisdiction to try, the parties were precluded by their conduct from questioning the verdict on account of the absence of those preliminaries. And in *Cox v. Cannon*, 4 *N. C.* 453 (*E. C. L. R.* vol. 33), 6 *Scott*, 347, it was held, that if a prisoner who executes a warrant of attorney, introduces a person as his attorney, he cannot afterwards set aside the warrant of attorney, on the ground that such attorney was uncertificated. Upon the whole, therefore, it is submitted that there is nothing upon the record to show that the imprisonment complained of is illegal, and the plaintiff has by her conduct estopped *herself from denying that [508 she was properly arrested and properly detained.

Woollett was not called on to reply.

GRESSWELL, J.(a)—The first and second points were disposed of in the course of the discussion. The plaintiff might have been estopped by her conduct from denying that she was properly arrested in the first instance. But that which is now complained of, is, that the sheriff detained her in custody, and still detains her, after he has had notice and knowledge that she was not the person named in the writ. How can the doctrine of estoppel apply to that? The cases which have been cited are all beside the question.

The rest of the court concurring, Judgment for the plaintiff.(b)

(a) Cockburn, C. J., was absent.

(b) The cause was tried at the sittings in London after this term, and the plaintiff obtained a verdict with 5*l.* damages.

***509] *In the matter of the Complaint of THOMAS BEADELL v.
THE EASTERN COUNTIES RAILWAY COMPANY.**

June 1.

A railway company agreed with a cab proprietor, in consideration of his paying them 600*l.* per annum, to allow him the exclusive liberty of plying for hire within their station:—The court refused to grant a writ of injunction against the company, under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), at the instance of another cab proprietor,—no inconvenience to the public being shown to have arisen from the arrangement.

PRENTICE moved for a writ of injunction against the Eastern Counties Railway Company, under the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, s. 2, to restrain them from giving an undue preference to one Clark, and imposing an undue and unreasonable prejudice on the applicant, under the following circumstances:—The complainant was the proprietor of two cabs which were duly licensed as hackney-carriages; and he complained that the Eastern Counties Railway Company refused to permit him to ply for passengers at their station at Shoreditch, they having, for a consideration of 600*l.* per annum paid to them by Clark, granted him the exclusive privilege of taking up passengers within their station. It appeared from the affidavits upon which the motion was founded, that the company allowed all cabs to enter the station for the purpose of setting down passengers at the booking-office, but that, having set down the persons they brought to the station, they were compelled to leave the yard. The learned counsel referred to *In re Marriott*, 1 C. B. N. S. 499 (E. C. L. R. vol. 87), as a case very nearly in point. There, the London and South-Western Railway Company made arrangements at one of their stations, with the proprietor of an omnibus running between the station and Kingston, to provide omnibus accommodation for all passengers by any of their trains to and from Kingston, and allowed him the *exclusive privilege* of driving his vehicle into the station-yard for the purpose of taking up
*510] and setting down passengers *at the door of the booking-office: and it was held, that, in the absence of special circumstances showing it to be reasonable, the granting of such exclusive privilege to one proprietor, and refusing to grant the like facilities to the applicant, who also brought passengers from Kingston as well as from other places beyond, was a breach of the prohibition against the granting of undue and unreasonable preferences, contained in the statute. [CRESSWELL, J.—That case is very far from being an authority in your favour. WILLIAMS, J.—There is no suggestion here, as there was in that case, that there is not ample accommodation for the public.] There is not: but it is submitted that it is contrary to the spirit of the act, to give such an exclusive privilege to one cab proprietor, to the prejudice of all others. [WILLIAMS, J.—In *Marriott's Case*, the decision rests expressly upon the inconvenience inflicted upon the public,

not upon the particular grievance to the applicant. CRESSWELL, J.—Besides, there the applicant was prevented by the company from setting down his passengers at the door of the booking-office. Here, the only complaint is, that the applicant is not permitted to ply for hire in the station-yard.] That which is complained of is clearly an undue and unreasonable privilege given to Clark. [WILLIAMS, J.—I think it is by no means an unreasonable thing, but, on the contrary, very important to the interests of the public, that the vehicles which ply for hire in the station-yard should be kept upon their good behaviour, by being under the control of the company. CRESSWELL, J.—The case of *Barker v. The Midland Railway Company*, 18 C. B. 46 (E. C. L. R. vol. 86), has some bearing upon this. The court there held that an omnibus proprietor who carried passengers and their luggage for hire to and from a railway station, could not maintain an action against the company for refusing to allow him to drive his vehicle into the station-yard.] There is nothing in the decision there that is inconsistent [*511 with the right sought to be enforced here.

CRESSWELL, J.(a)—I am of opinion that the applicant has made out no case for the exercise of our jurisdiction under the statute.

WILLIAMS, J.—The affidavits upon which this motion is founded do not show that the agreement with Clark is not highly beneficial to the public as well as to the company. And it has been expressly laid down, in a case which has not been cited,—*In re Barret*, 1 C. B. N. S. 423 (E. C. L. R. vol. 87),—that the statute in question was passed for the benefit of the public, and not for that of individuals.

WILLES, J., concurring,

Rule refused.

(a) Cockburn, C. J., for private reasons, took no part in the discussion.

***FRAZER v. HATTON and Another. May 23. [*512**

The plaintiff, a seaman, in March, 1854, shipped on board a vessel of the defendants, called the *Custos*, to serve as steward, and signed articles, as required by the statute 13 & 14 Vict. c. 93,—which professed to be an agreement between the master and the several persons whose names were thereto subscribed,—at 3*l.* per month wages, for a voyage “from Liverpool to the west coast of Africa, to trade in any ports, bays, or rivers therein, and back to a final port of discharge in the united kingdom, or for a term not to exceed three years.” The articles contained, amongst others, the following provision,—“The crew, if required, to be transferred to any other ship in the same employ.” After the *Custos* had remained some time on the African coast, the plaintiff, at the request of the captain, was transferred to another and a larger vessel of the defendants’ engaged in the same trade, called the *Dauntless*, entering into fresh articles with the master, under which he was to receive wages at the rate of 4*l.* per month. The *Dauntless* arrived in Liverpool on her return voyage in June, 1856, when the plaintiff claimed wages at 4*l.* per month for the period during which he had served on board the *Dauntless*. The defendants refused to pay him at the increased rate, insisting that he was bound by the original articles to serve on board any ship “in the same employ;” and the plaintiff declined to accept the sum mentioned in the original articles:—Held,—

First, that the articles were not invalid for being in the alternative,—“from Liverpool to the west coast of Africa and back, or for a term not to exceed three years:”

Secondly, that the provision for the transfer of the crew to another vessel in the same employ, was not in contravention of the statute :

Thirdly, that the provision for transfer was not limited to a transfer of the whole crew collectively, but that the articles constituted an agreement between the owners and each of the crew for himself, and consequently that the plaintiff was bound to serve under the original articles, and there was therefore no consideration for the master's promise to pay the increased wages : Fourthly, that there was no neglect or refusal by the defendants, without sufficient cause, to pay the plaintiff the wages really due, so as to render them liable to the penalty imposed by the statute.

Held also, that the circumstance of the fresh articles not having been executed in the presence of a consular agent, was not an objection to their validity, provided they could have been set up.

THIS was an action brought by the plaintiff to recover from the defendants, the owners of two vessels named respectively the *Custos* and the *Dauntless*, 87*l.* 1*s.* 9*d.*, the balance of a sum of 100*l.* alleged to be due from the defendants to the plaintiff for wages as a hired mariner and steward, and for double pay, under the 187th section of the Merchant Shipping Act, 1854, for neglect or refusal to make payment of wages within the time prescribed by the act, without sufficient cause. In the first count the plaintiff claimed certain wages due to him as steward of the *Custos*, and in the second wages as steward of the *Dauntless*. The declaration also contained counts for work and *513] services and for *money alleged to be due from the defendants to the plaintiff upon accounts stated between them. The defendants paid into court 67*l.* 6*s.* 9*d.*, and, as to the residue of the demand, pleaded never indebted.

The cause was tried before Bramwell, B., at the last Summer Assizes at Liverpool. It appeared that the defendants were merchants trading to the west coast of Africa ; and that the plaintiff, on the 27th of March, 1854, shipped on board the *Custos* (of 277 tons burthen), then lying at Liverpool, as steward for a voyage thence to the west coast of Africa and back, or for a term not exceeding three years, at the wages of 3*l.* per month. The articles which the plaintiff signed, and which were in the form sanctioned by the Board of Trade, as required by the Mercantile Marine Act, 13 & 14 Vict. c. 93, contained amongst other terms the following :—

“ The several persons whose names are hereto subscribed hereby agree to serve on board the said ship, in the several capacities expressed against their respective names, on a voyage from Liverpool to the west coast of Africa, to trade in any ports, bays, or rivers therein, and back to a final port of discharge in the united kingdom, or for a term not to exceed three years : and the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior officers, in everything relating to the said ship and the stores and cargo thereof, whether on board, in boats, or on shore : in consideration of which services to be duly performed,

the said master hereby agrees to pay to the said crew, as wages, the sums against their names respectively expressed, and to supply them with provisions according to the annexed scale: And it is hereby agreed that any *embezzlement or wilful or negligent destruction of any part of the ship's cargo or stores, shall be made good [*514 to the owner out of the wages of the person guilty of the same; and, if any person enters himself as qualified for a duty which he proves incompetent to perform, his wages shall be reduced in proportion to his incompetency: And it is also agreed that the regulations authorized by the board of trade, which in the paper annexed hereto are numbered 1 to 22 inclusive, are adopted by the parties hereto, and shall be considered as embodied in this agreement: And it is also agreed, that, if any member of the crew considers himself to be aggrieved by any breach of the agreement, or otherwise, he shall represent the same to the master or officer in charge of the ship, in a quiet and orderly manner, who shall thereupon take such steps as the case may require: And it is also agreed that no grog will be allowed: *The crew, if required, to be transferred to any other ship in the same employ, and not to trade on their own account.*"

The plaintiff sailed in the *Custos*, and remained on board of her for some months. On the 12th of January, 1855, the plaintiff left the *Custos*, and, together with the master, entered on board the *Dauntless* (of 800 tons burthen), another vessel also belonging to the defendants, under fresh articles, with an advance of wages, viz., to 4*l.* per month; the new articles, however, not being signed in the presence of a consular agent,—there being no constantly resident consular agent at the place where the transfer occurred. The plaintiff remained on board the *Dauntless*, doing duty as steward, until her arrival in England on the 22d of June, 1856. The plaintiff proved that he served in the capacity mentioned on board the *Custos*, and that he was induced by the captain's offer of the increased pay to transfer himself to the *Dauntless*.

*It appeared, that, on the arrival of the *Dauntless* at Liverpool, the plaintiff claimed to be paid wages at the rate of 4*l.* per [*515 month for the period during which he had served on board the *Dauntless*. The defendants, however, refused to pay him more than at the rate mentioned in the articles under which he shipped on board the *Custos*; insisting that he was by those articles bound to give his services, if required, on board the *Dauntless*, that being a vessel "in the same employ" as the *Custos*; and they declined to pay him even at the lower rate, unless he would agree to accept it as payment in full.

On the part of the defendants, it was objected that the captain had no authority to stipulate with the plaintiff for an increased rate of wages, and that there was no consideration for his promise to that

effect, the plaintiff being already bound by the terms of the original articles.

The learned judge directed that a verdict be entered for the plaintiff for 19*l.* 15*s.*, being the difference between the 3*l.* and 4*l.* per month for the time he served on board the *Dauntless*, and 2*l.* 13*s.* 4*d.*, being the penalty under the 17 & 18 Vict. c. 104, s. 87, for the defendants' neglect or refusal without sufficient cause to make payment of the wages due,—reserving leave to the defendants to move to enter a non-suit or a verdict for them, if the court should think that the plaintiff was not entitled to the increased pay, and that the penalty had not been incurred.

Brett, in Michaelmas Term last, obtained a rule nisi accordingly. He submitted that the contract under the articles was a separate contract between the owners and each seaman who signed them; that the plaintiff was bound by the articles he signed on shipping on board the *516] *Custos* to serve for the stipulated period on *board any other vessel in the same employ, and consequently that the master had no authority to make, nor was there any consideration for the making of, the subsequent articles,—citing *Stilk v. Myrick*, 2 Camp. 817, and *Harris v. Carter*, 8 Ellis & B. 559 (E. C. L. R. vol. 77). He also urged, that, inasmuch as the second articles were not signed in the presence of a consular agent, as required by the 160th section of the 17 & 18 Vict. c. 104, (a) they were void: but upon this point no rule was granted, the court observing that the omission of that formality would not avoid the agreement, assuming that the master had authority to make it.

Edward James, Q. C., and *Milward*, on a subsequent day in the same term showed cause.—The plaintiff is entitled to retain his verdict for the full amount, or, if not, at all events, for the sum due to him for double wages for the ten days during which the wages legally due were *517] withheld. The contract was for a voyage *from Liverpool to the west coast of Africa and back to a final port of discharge in the united kingdom, or for a term not to exceed three years; and it contains the following stipulation,—“The crew, if required, to be transferred to any other ship in the same employ.” The *Custos* being on the coast of Africa, the captain was transferred to the *Dauntless*;

(a) Which enacts that “every master of a British ship who engages any seaman at any place out of Her Majesty's dominions in which there is a British consular officer, shall, before carrying such seaman to sea, procure the sanction of such officer, and shall engage such seaman before such officer; and the same rules as are hereinbefore (s. 159) contained with respect to the engagement of seamen before shipping masters in the united kingdom shall apply to such engagements made before consular officers; and, upon every such engagement, the consular officer shall endorse upon the agreement his sanction thereof, and an attestation to the effect that the same has been signed in his presence, and otherwise made as hereby required; and every master who engaged any seaman in any place in which there is a consular officer, otherwise than as hereinbefore required, shall incur a penalty not exceeding 20*l.*; and if in any case the endorsement and attestation hereby required is not made upon the agreement, the burden of proving the engagement to have been made as hereinbefore required shall lie upon the master.”

and, desiring to have the plaintiff's services on board that vessel, he offered to increase his wages to 4*l.* per month, in consideration of the increased duty which from the larger size of the vessel would be cast upon him; and the new articles were accordingly signed. It is clear that the service on board the *Dauntless* was not required of the plaintiff as a duty, otherwise no new articles would have been entered into. The main question here is, whether there is anything in the former articles to preclude the defendant from entering into this new engagement. It is submitted that there is not; for, the stipulation as to the transference of the plaintiff's services to another vessel, is inconsistent with the provisions of the 17 & 18 Vict. c. 104, and void as against the seamen; and, further, it applies not to individual seamen, but to a transhipment of *the entire crew*. The 149th section of the 17 & 18 Vict. c. 104, enacts that "the master of every ship, except, &c., shall enter into an agreement with every seaman whom he carries to sea from any port in the united kingdom as one of his crew, in the manner hereinafter mentioned; and every such agreement shall be in a form sanctioned by the board of trade, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars as terms thereof, that is to say,—1. The nature, and, as far as practicable, the duration of the intended voyage or engagement: 2. The number and description of the crew, specifying how many are *engaged [*518 as sailors: 3. The time at which each seaman is to be on board or to begin work: 4. The capacity in which each seaman is to serve: 5. The amount of wages which each seaman is to receive: 6. A scale of the provisions which are to be furnished to each seaman: 7. Any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishment for misconduct, which have been sanctioned by the board of trade as regulations proper to be adopted, and which the parties agree to adopt: and every such agreement shall be so framed as to admit of stipulations, to be adopted at the will of the master and seamen in each case, as to advance and allotment of wages, and may contain any other stipulations which are not contrary to law: provided, that, if the master of any ship belonging to any British possession has an agreement with his crew made in due form according to the law of the possession to which such ship belongs or in which her crew were engaged, and engages single seamen in the united kingdom, such seamen may sign the agreement so made, and it shall not be necessary for them to sign an agreement in the form sanctioned by the board of trade." The 182d section, which was obviously introduced for the protection of seamen against improvident agreements, enacts that every stipulation in any agreement, inconsistent with any provision of the act, shall be wholly inoperative. It is true, that, as regards the voyage originally contemplated, these terms were complied

with; but the articles were manifestly inconsistent with the 149th section, and more especially with the second stipulation contained therein, as to the number and description of the crew. The transfer might be to a vessel for a totally different voyage; and the words "any other ship in the same employ" do not necessarily confine it to a vessel belonging to the same owners. The 150th *section, art. 4, contains a provision as to transfer of services to another ship. The 156th section shows that the construction now contended for is the correct one: it enacts, that, "in cases where several home-trade ships belong to the same owner, the agreement with the seamen may, notwithstanding anything herein contained, be made *by the owner*, instead of by the master, and *the seamen may be engaged to serve in any two or more of such ships, provided that the names of the ships and the nature of the service are specified in the agreement*; but, with the foregoing exception, all provisions herein contained which relate to ordinary agreements for home-trade ships shall be applicable to agreements made in pursuance of this section." Here, the agreement contains neither the name of the ship to which the transfer is to be made, nor the nature of the service which is to be substituted. The 160th section, which provides for the engaging of seamen in foreign ports, contains the same requirements as under s. 149. But, assuming that the plaintiff is not entitled to recover the larger amount claimed, he is at all events entitled to double wages for the period during which the defendants withheld the pay stipulated by the articles for the service on board the *Custos*, under the 187th section, which enacts that "the master or owner of every ship shall pay to every seaman his wages within the respective periods following, that is to say, in the case of a home-trade ship, within two days after the termination of the agreement, or at the time when such seaman is discharged, whichever first happens; and in the case of all other ships (except ships employed in the southern whale fishery, or on other voyages for which seamen by the terms of their agreement are wholly compensated by shares in the profits of the adventure) within three days after the cargo has been delivered, or within five days after the seaman's *discharge, whichever first happens; and, in all cases, the seaman shall at the time of his discharge be entitled to be paid on account a sum equal to one-fourth part of the balance due to him; and every master or owner who neglects or refuses to make payment in manner aforesaid, without sufficient cause, shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed beyond the respective periods aforesaid, and such sums shall be recoverable as wages." The mere fact of the plaintiff's claiming too much, did not absolve the owners from paying or tendering what was really due: and here there was no evidence of any tender.

Brett, in support of his rule.—There was no neglect or refusal “without sufficient cause” to pay what was really due: the plaintiff demanded to be paid at the rate of 4*l.* per month. [*WILLIAMS, J.*—It was not absolutely necessary that a tender should be made; but at least there should have been an offer to pay what was due.] The plaintiff’s excessive demand prevented the settlement. Where there is a *bonâ fide* dispute, it cannot be said that the withholding payment was wilful. The defendants could not have obtained a discharge pursuant to the 175th section.(a) In construing *such an agreement as this, regard must be had to the voyage with respect to [*521 which it is made. The voyage here was in the African trade,—which consists in cruising about among the rivers and bays to barter with the natives. To carry on this sort of trade, two or more vessels are necessary,—one loading the produce for home, while the others are engaged in collecting it. [*WILLIAMS, J.*—If that had been specified in the agreement, one of the objections which have been made to it would have been obviated. The statute requires that the vessel and the voyage shall be specified. Here, the agreement is general in its terms.] The intention of the parties is manifest. The vessel coming home would necessarily require a full crew; the others would not. The deadly nature of the climate also would require provision to be made for transferring seamen from one vessel to another. The wages are calculated with a due regard to these circumstances: and the provisions of the act, which are designed to guard the seaman from being entrapped into an improvident bargain, are sufficiently complied with. The suggestion that the stipulation in question applies only to the crew *collectively, is of no weight; for, the whole scope of the articles shows that they constitute a bargain between the master or [*522 owners and each individual seaman, each stipulating for his own acts and conduct only. [*CROWDER, J.*—Some owners may trade to the coast of Africa and to Hudson’s Bay: under this agreement, the plaintiff might have been transferred to a vessel bound for the latter place.]

(a. “The following rules shall be observed with respect to the settlement of wages, that is to say,—1. Upon the completion before a shipping-master of any discharge and settlement, the master or owner, and each seaman, shall respectively, in the presence of the shipping-master, sign, in a form sanctioned by the board of trade, a mutual release of all claims in respect of the past voyage or engagement, and the shipping-master shall also sign and attest it, and shall retain and transmit it as herein directed,—2. Such release so signed and attested, shall operate as a mutual discharge and settlement of all demands between the parties thereto in respect of the past voyage or engagement,—3. A copy of such release certified under the hand of such shipping-master to be a true copy, shall be given by him to any party thereto requiring the same; and such copy shall be receivable in evidence upon any future question touching such claims as aforesaid, and shall have all the effect of the original of which it purports to be a copy,—4. In cases in which discharge and settlement before a shipping-master are hereby required, no payment, receipt, settlement, or discharge otherwise made shall operate or be admitted as evidence of the release or satisfaction of any claim,—5. Upon any payment being made by a master before a shipping-master, the shipping-master shall, if required, sign and give to such master a statement of the whole amount so paid; and such statement shall, as between the master and his employer, be received as evidence that he has made the payments therein mentioned.”

The same objection would arise whatever might be the construction put upon the agreement. [WILLES, J.—The form of articles sanctioned by the board of trade requires the ship to be named, and the 1st article of s. 149 requires the voyage to be defined: have these been complied with?] The statute is only directory in those respects; and that section provides that the agreement may contain any other stipulations which are not contrary to law. There is nothing illegal in the stipulation for the transfer; and, if there were, it is not pleaded. [WILLES, J.—You set up the agreement, and insist that the plaintiff is bound by it. How could he plead its illegality?] The directions in the statute are complied with as far as is practicable in these cases; it was impossible to name by anticipation the substituted ship, or to refer to it with more particularity. The whole course of this extensive and important trade will be upset by a construction of the articles adverse to that now contended for. [WILLES, J.—The 160th section seems to give some colour to your argument: it would seem to apply to the engagement of seamen at starting on the voyage.] To arrive at any other construction, the court must hold that this agreement was illegal in its inception.

WILLIAMS, J.—This case involves a point of very general importance, and therefore we will take time to consider our judgment.

Cur. adv. vult.

*523] *WILLIAMS, J., now delivered the judgment of the court:—This was an action brought to recover 87*l.* 1*s.* 9*d.*, the balance of a sum of 100*l.* alleged to be due from the defendants to the plaintiff for wages earned by him as steward of their vessels the *Custos* and the *Dauntless*, and for double pay under the statute for neglect or refusal to make payment of wages, without reasonable cause. The defendants paid into court the sum of 67*l.* 6*s.* 9*d.*, and as to the residue of the demand, pleaded never indebted.

At the trial it was proved as follows:—The defendants were merchants at Liverpool, and owners of the *Custos*, the *Dauntless*, and other vessels engaged in a trade between this country and the west coast of Africa. In the month of March, 1854, the *Custos* was lying at Liverpool, bound for the west coast of Africa. Upon the 27th of that month the plaintiff signed the ship's articles in the statutory form, agreeing thereby to serve as steward, at 3*l.* per month, upon a voyage described as being "from Liverpool to the west coast of Africa, to trade in any ports, bays, or rivers therein, and back to a final port of discharge in the united kingdom, or for a term not to exceed three years." The articles also contained the following provision, viz. "The crew (if required) to be transferred to any other ship in the same employ." The plaintiff sailed in the *Custos* to a port on the west coast of Africa, and served on board her pursuant to the articles until the 12th of January, 1855. On that day, the master of the *Custos* left

that vessel, and transferred himself and the plaintiff to the *Dauntless*, a vessel of the defendants' in the same employ as the *Custos*, within the meaning of the articles of the latter.

The plaintiff stated that he accompanied the master into the *Dauntless* at his request, and that articles were *thereupon signed, [*524 by which he was to receive 4*l.* per month, instead of 3*l.* per month, for completing the voyage in the *Dauntless* instead of the *Custos*; and that he served as steward of the *Dauntless* from the 12th of January, 1855, to the 22d of June, 1856, when she completed her voyage, and arrived in England. The plaintiff thereupon claimed to be paid at the rate of 4*l.* per month for the period of his service aboard the *Dauntless*, pursuant to the articles. The defendants, however, insisted that the plaintiff was only entitled to the sum of 3*l.* per month for the whole time of service, inasmuch as the original articles signed at Liverpool bound him to transfer himself to and serve aboard the *Dauntless*, being a ship in the same employ as the *Custos*, at the same rate as if he had continued his voyage aboard the *Custos*. The learned judge directed a verdict for the plaintiff for the sum of 19*l.* 15*s.*, being the difference between 3*l.* and 4*l.* per month during the period of service on board the *Dauntless*, and 2*l.* 13*s.* 4*d.*, being the penalty imposed by the 17 & 18 Vict. c. 104, s. 187, for neglect or refusal to make payment, without sufficient cause; but reserved leave for the defendants to move to enter a nonsuit or a verdict for them, in case the court should be of opinion that the plaintiff was only entitled to 3*l.* per month during the whole period, and that the penalty had not been incurred.

A rule was accordingly obtained, which was argued before my brothers Crowder, Willes, and myself.

Upon the argument, it was scarcely denied by the learned counsel for the plaintiff, and could not have been so with success, that, if the articles signed at Liverpool were in compliance with the statute, and in terms obligatory upon the plaintiff to transfer himself to the *Dauntless*, and complete his voyage in her at the original wages of 3*l.* per month, there was no *consideration for the agreement in the second articles to pay 4*l.* per month, nor any authority in the master to [*525 make such agreement: see *Thompson v. Havelock*, 1 Campb. 527; *Harris v. Watson*, Peake's N. P. C. 72; *Stilk v. Meyrick*, 2 Campb. 317.

It was, however, argued that the first articles were void for non-compliance with the Mercantile Marine Act, which for this purpose is the 13 & 14 Vict. c. 93; the 17 & 18 Vict. c. 104, to which reference was made in the course of the argument, not having been passed till the 10th of August, 1854, long after the first articles were entered into, and not having come into force till the 1st of May, 1855. The section applicable to the case is the 46th, which enacts "that every master of a ship shall, on carrying any seaman to sea as one of his crew, enter into an agreement with him in the manner hereinafter mentioned; and

every such agreement shall be in a form to be sanctioned and issued by the board of trade, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars as terms thereof,—1. The nature, and, as far as practicable, the length of the voyage or engagement on which the ship is to be employed,—2. The time at which each seaman is to be on board, or to begin work,—3. The capacity in which each seaman is to serve,—4. The amount of wages which each seaman is to receive,—5. A scale of the provisions which are to be furnished to each seaman,—6. Any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishments for misconduct, which have been sanctioned by the board of trade as regulations to be adopted, and which the parties agree to adopt; and shall be so framed as to admit of stipulations, to be adopted *526] at the will of the master and seaman in each *case, as to advance and allotment of wages; and may contain any other stipulations which are not contrary to law."

The first objection to the articles, that it was in the alternative for "a voyage from Liverpool to the west coast of Africa, and back, or for a term not to exceed three years," seems not maintainable, when it is considered that the alternative may be construed with the rest of the description of the voyage, as limiting to three years the time during which the seaman was obliged to serve even upon such a voyage, and disentitling the owners to his services beyond that time. This construction makes the agreement valid.

Another objection was, that the provision for transferring the crew to any other ship was inconsistent with the statute, and therefore void. We are, however, unable to find in the statute anything which made it unlawful for persons engaged in a trade of this description to stipulate for the services of a seaman for a specified voyage not exceeding a fixed period out and home, to be rendered either on board the vessel in which he left this country, or any other vessel of the same owner engaged in a similar adventure; and the statute (s. 46) provides for an insertion in the articles of any stipulation which is not contrary to law.

It was further contended on the part of the plaintiff, that, assuming the articles to be valid, the provision for transferring "the crew" into any other ship applied only to a case where the whole crew were transferred together, and did not apply to the transfer of less than the whole. The articles constitute in all other respects an agreement between the owners and each of the crew for himself; and the expression "the crew" is used in other parts of the agreement to express the crew respectively; and in the clause under consideration it governs the stipulation "not to trade on their own account," *which is clearly *527] several as to each of the crew, and not merely joint as to all

The plaintiff was, therefore, bound by the first articles, and entitled under them to 3*l.* per month only for the whole period of service.

It was finally contended on the part of the plaintiff, that, assuming him not to have been entitled to recover more than the 3*l.* per month for which he originally agreed to serve, still that he was entitled to recover ten days' double pay under the 17 & 18 Vict. c. 104, s. 187, as a penalty for neglect or refusal without sufficient cause to pay the amount due at 3*l.* per month, being the amount paid into court. This was upon the supposition that, the plaintiff being entitled to 3*l.* per month only, the defendants neglected or refused to pay that amount without sufficient cause. It appears, however, that the defendants were always ready to pay that sum, if the plaintiff would receive it in settlement; and that the plaintiff never was willing to receive it or give a discharge under s. 175, but insisted upon payment of the larger amount, to which we hold him not to be entitled. The defendants, therefore, cannot be said to have neglected or refused to make payment of the amount which they were liable to pay, or to have done so without sufficient cause.

The rule to enter a nonsuit must, therefore, be made absolute.

Rule absolute.



*SIMMONS v. TAYLOR, Public Officer of THE LONDON JOINT STOCK BANK. Dec. 8. [*528]

The statute 19 & 20 Vict. c. 25, which makes a "crossed check" payable only to or through a banker, applies to the state of the instrument *at the time of its presentment*: and therefore the banker upon whom a check is drawn is justified in paying it otherwise than through another banker, if, when presented, it does not bear any crossing on the face of it. The crossing forms no part of the check itself, and consequently its erasure does not amount to a forgery.

THIS was an action against the defendant as the registered public officer of the London Joint Stock Bank, to recover the balance of a customer's account. The declaration contained a count for money lent, and a count for money found due upon an account stated.

Plea, payment.

The cause was tried before Cockburn, C. J., at the sittings in London after last Hilary Term, when the following facts appeared in evidence:—The plaintiff, who had an account with the London Joint Stock Bank, on the 28th of August, 1856, drew upon it a check for 126*l.*, payable to "George Master, Esq., or bearer," *crossed* it in the usual way by writing across it "& Co.," between two parallel lines, and enclosed the check so crossed in an envelope addressed to "George Master, Esq., 22, Duke street, *Manchester Square*," and on the same day caused it to be posted. The true address of Mr. Master was, No. 22, Duke

Street, "*Grosvenor Square*," and the postman proved the delivery of the letter at the house to which it was addressed, and which appeared at the time to have been uninhabited and under repair; but it never reached the hands of Mr. Master. Shortly after its date, the check was presented by a stranger at the bank, and paid across the counter as an ordinary check, there being nothing then upon the face of it to indicate that it was a "crossed check," the lines and the words "& Co." having been so ingeniously obliterated from it as to leave no trace, except on a close inspection against a strong light, of their ever having been there.

*529] *On the part of the plaintiff it was insisted that the payment of the check so altered,—such alteration amounting in point of law to a forgery,—was not a payment authorized by him; and that the bankers had been guilty of negligence, for that they were bound to see that the check when paid by them was unaltered, and that they might, by having their checks printed upon paper of a description that could not be tampered with, have prevented the fraud.

On the other hand, it was insisted that no negligence was imputable to the defendant, but that the plaintiff himself had been guilty of negligence in the mode of sending the check.

The jury found that there had been no negligence on either side: and his Lordship thereupon directed the verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter a verdict for him for the amount of the check, if the court should be of opinion that the payment of the check "otherwise than through some banker," was a payment unauthorized by the plaintiff.

Byles, Serjt., in Easter Term last, obtained a rule nisi accordingly, "on the ground that the payment of the check by the defendant was not authorized, the check having been crossed."

Bovill, Q. C., and *Archibald*, in Trinity Term, showed cause.—The arguments upon which the rule will be attempted to be supported, will be,—first, that the bank was not justified in paying the check, because it was a forged instrument,—secondly, that, by virtue of the recent statute 19 & 20 Vict. c. 25, the check was only payable through some banker. There can be no doubt an alteration of a bill or check in a material part amounts to forgery: but no case has held that the obliteration of the crossing of a check constitutes a *forgery. *530] On the contrary, it has been expressly decided that the crossing forms no part of the instrument, but is a mere memorandum indicating that the holder is to present it for payment through some banker. This was held by the Court of Exchequer in *Bellamy v. Marjoribanks*, 7 Exch. 389.† That was an action against a banker for money lent, to which the defendant pleaded payment. It appeared that the plaintiff had drawn a check on the defendant, and crossed it thus,—“Bank of

England, for account of the Accountant-General." A party to whom this check was given struck out the crossing by running a pen through it, leaving it however perfectly legible, and crossed the check a second time with the name of his own bankers, G. & Co., and paid it into their bank, to the credit of his own account. The check, being presented by them for payment, was paid by the defendant, who charged it to the debit of the plaintiff's account. The money was placed by G. & Co. to the credit of their principal in his account with them, and he converted the money to his own use. It was found that the Accountant-General would not receive payment by check, unless drawn on the Bank of England: and it was held that the circumstance of the check being thus doubly crossed afforded no additional evidence of negligence against the defendant. Parke, B., in delivering the judgment of the court, there said: "The crossing a check cannot operate as an endorsement to the banker whose name is used, because it was not written with any intent to transfer the property in the check to him, and it wants the essential part of an endorsement, the delivery of the instrument to the endorsee. And we think it cannot well be supposed that the usage is to be considered as equivalent to a direction by the holder or drawer to the drawee not to pay to the bearer, but to a particular person only; for, *then the check would be altered in a manner which would take it out of the exemption of the stamp act, [*531 55 G. 3, c. 184, sched. part 1, which applies to checks payable to bearer only; and the bankers to whom it was addressed would not be bound to pay the person named. We are, therefore, of opinion that a crossing the check with the name of a banker cannot have the effect of restricting its negotiability to such banker alone. To hold it to have this effect, would be to render the instrument no longer a check." That case was confirmed by the Court of Queen's Bench in *Carlton v. Ireland*, 5 Ellis & B. 765 (E. C. L. R. vol. 85). Independently, therefore, of the recent statute, it may be assumed as clear law, that the crossing formed no part of the instrument, and that the banker might lawfully pay the amount to the bearer, notwithstanding such crossing. Such being the state of the law, an act is passed "to amend the law relating to drafts on bankers." It begins with reciting that "doubts have arisen as to the obligations of bankers with respect to cross-written drafts; and that it would conduce to the ease of commerce, the security of property, and the prevention of crime, if drawers or holders of drafts on bankers payable to bearer or to order, on demand, were enabled effectually to direct the payment of the same to be made only to or through some banker;" and then it proceeds, in s. 1, to enact, that, "in every case where a draft on any banker made payable to bearer or to order on demand *bears across its face* an addition in written or stamped letters, of the name of any banker, or of the words 'and company,' in full or abbreviated, either of such additions *shall have the force of a*

direction to the bankers upon whom such draft is made, that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker." The crossing contemplated by the statute is still no part of the instrument: it is something which *532] is or may be *done by the person receiving the check. To what period of time does the statute refer? How is the banker to know whether the check is a crossed check or not, but by the appearance it bears at the time of its presentment? [CRESSWELL, J.—Suppose a check were issued without crossing, and the payee, or one to whom he passes it, crosses it with the name of a banking firm or the words "& Co.," and a subsequent holder erases the crossing so skilfully as to leave no trace of it, and the banker upon whom it is drawn pays it, does he not pay it according to the direction of his customer?] Undoubtedly he does. [COCKBURN, C. J.—What would be the consequence if the drawer of the check, after crossing the check, himself erased the crossing?] If it is immaterial by whom the check is crossed, it must be equally immaterial by whom the crossing is erased. Suppose the words "& Co." were written with a black-lead pencil, and afterwards rubbed out?(a) [CRESSWELL, J.—That would be precisely the same as the case I put. COCKBURN, C. J.—Suppose the statute, instead of authorizing the crossing of a check with the name of a banker or the words "& Co.," had authorized the writing across it a direction, in extenso, for its payment to or through some banker, and had then enacted that the check should not be paid in contravention of that direction, and that direction were obliterated by artificial means, and the check paid as an uncrossed check, what would have been the result?] In such a case, it would have been difficult to say that the alteration did not amount to a forgery, and that the payment was not unauthorized. [COCKBURN, C. J.—Is not this the same thing, the words "& Co." being declared by *533] the *statute to be equivalent to such a direction?] The direction is no part of the instrument: and the question is to be determined by that which appears upon the face of the check at the time of its presentment. How can that be a direction to the banker which does not appear upon the check when presented? The object of the statute was merely to settle a doubt which had existed in Westminster Hall as to what the crossing really imported, and not to impose any additional liability upon the banker. [WILLIAMS, J.—May a *bonâ fide* holder of a crossed check lawfully erase the crossing?] It is submitted that he may. [WILLIAMS, J.—Suppose a party (not representing a banker) presents a crossed check over the counter, and the banker upon whom it is drawn refuses to pay it, and the person presenting it at once erases the crossing, either with a knife or by drawing a pen

(a) An endorsement written on a promissory note with a black lead pencil, instead of ink, is a writing in law, and entitles the endorsee to sue upon the note: *Geary v. Physic*, 7 D. & R. 654 (K. C. L. R. vol. 16).

through it, and again presents it, would the banker be justified in paying it?] He would. The whole question undoubtedly is involved in difficulty: the only proper course is, to see what was the object of the legislature; and this is best discovered from the preamble. Looking at the whole statute, it is clear that the crossing of the check no more forms part of the instrument now than it did before the passing of the statute. And, to amount to a *direction* to the banker, it clearly must appear upon the instrument when presented. The language of the 19th section of the 16 & 17 Vict. c. 59, which is in *pari materia*, supports this construction: that section provides "that any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, *when presented for payment*, purport to be endorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker [*534] to prove that such endorsement, or any subsequent endorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any endorser thereof." The rule for the construction of statutes is thus propounded by Coleridge, J., in *The King v. The Poor Law Commissioners*, in the *Matter of the Parish of St. Pancras*, 6 Ad. & E. 1, 7 (E. C. L. R. vol. 33); 1 N. & P. 371 (E. C. L. R. vol. 36),—"It is, in my opinion, so important for the court, in construing modern statutes, to act upon the principle of giving full effect to their language, and of declining to mould that language in order to meet either an alleged convenience or an alleged equity, upon doubtful evidence of intention, that nothing will induce me to withdraw a case from the operation of a section, which is within its words, but clear and unambiguous evidence that so to do is to fulfil the general intent of the statute, and also that to adhere to the literal interpretation is to decide inconsistently with other and overruling provisions of the same statute. When the evidence amounts to this, the court may properly act upon it; for, the object of all rules of construction being to ascertain the meaning of the language used, and it being unreasonable to impute to the legislature inconsistent intents upon the same general subject-matter, what it has clearly said in one part must be the best evidence of what it has intended to say in the other." *Hall v. Fuller*, 5 B. & C. 750 (E. C. L. R. vol. 11), 8 D. & R. 464 (E. C. L. R. vol. 16), will probably be relied on for the plaintiff; but there the decision proceeded upon the ground that the payment was good to the extent of the original order, but unauthorized as to the excess. Here, the erasure of the crossing leaves the original order intact.

Byles, Serjt., and *C. G. Addison*, in support of the rule.—Upon the strictest and most literal construction *of the statute, the plaintiff is entitled to the verdict. The first object of the statute, as [*535]

appears from the preamble, was, *the ease of commerce*, by encouraging the practice of making large payments by checks upon bankers; the second, *the security of property*, by (amongst other things) rendering the sending of checks by the post more safe; and the third, *the prevention of crime*, by making it more difficult for persons dishonestly possessing themselves of such instruments to dispose of them: and the mode by which the legislature contemplate attaining these objects, is, by enabling the *drawers* or *holders* of drafts on bankers payable to bearer or *to order*, on demand, "effectually to direct the payment of the same to be made to or through some banker,"—that is, to put such a direction upon the check that it shall be paid only through some banker, and that such direction shall not be evaded except by means of a forgery. It must be borne in mind that checks payable "to order" never were crossed before. The enacting words are plain and simple,—"In every case where a draft on any banker made payable to bearer or to order on demand, *bears* across its face an addition in written or stamped letters, of the name of any banker, or of the words 'and company,' in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made, that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker." According to the construction contended for on the other side, the crossing has no force at all. There is no reason why the word "bears" should be restricted to the time of the presentment of the instrument. [CRESSWELL, J.—When is a check a direction to the banker?] When it is issued. When is it a draft? [CRESSWELL, J.—It is a draft when *536] issued, a direction to the banker when presented. *COCKBURN, C. J.—It must be taken as an entire transaction,—inchoate at the time of the issuing of the check, complete when the presentment takes place.] Suppose a bill were made payable to John Smith or order, and he endorses it in blank, the holder may restrict the negotiability of the instrument by writing above the name of John Smith, "pay Thomas Jones." [CRESSWELL, J.—That would only effectuate the intention of the endorser, by pointing out more particularly the intended endorsee. Do you contend that this check is no longer a check payable to bearer?] *Bellamy v. Marjoribanks*, 7 Exch. 389,† and *Carlton v. Ireland*, 5 Ellis & B. 765, have decided that a crossed check is still a check payable to bearer; but now it must be presented by or through some banker. [CRESSWELL, J.—Then it is *not* a check payable to bearer.] The bearer must present it through a particular channel. [CRESSWELL, J.—That is a contradiction in terms: it must cease to be payable "to bearer," when the bearer is not entitled personally to demand it. WILLIAMS, J.—The substance of the enactment is, that, if the check bears across its face certain words, the drawee's authority to pay it is abridged: and your argument is, that, if it ever had those

words across it, the nature of the instrument is altered, and the authority abridged?] Precisely so. The statute in effect makes the crossing a part of the check,—though it is unnecessary for the present purpose to carry the argument so far. The relation of banker and customer is thus treated by Lord Langdale, M. R., in *Watts v. Christie*, 11 Beavan, 543, 551,—“In the ordinary relation between banker and customer, the customer is a mere common creditor of the banker. A debt is owing to the customer, which he may at any time call on the banker to pay, and which it is the duty of the banker to pay upon his order or check. The customer may order it to be paid to himself or anybody *else, or he may order it to be carried over or transferred from his own account to the account of any other person, as he pleases. [*537 He may do so by a written instrument; and I know nothing to prevent his doing so by a verbal direction, except this,—that the bank may require some written evidence of this order to transfer: and I believe there is no necessity for giving a written instrument, except for the purpose of evidence.” A debt due from a banker to his customer is barred by the statute of limitations: *Pott v. Clegg*, 16 M. & W. 321.† The effect of the crossing of a check was considered in a case of *Stewart v. Lee*, M. & M. 158 (E. C. L. R. vol. 22). There, C. drew a check on his bankers payable to A. and B., assignees of E., or bearer, and wrote the names of their bankers across it. B., who had another (private) account with the bankers, paid the check in to that account; and it was held that the bankers were justified in applying it to that account; the drawer's writing the names of the bankers of the payees of the check across it not being, according to the custom of trade, information to the bankers that the money was that of the payees. Further, it is submitted that the effect of the erasure of the crossing, was to make the check an entirely new instrument: the check which the bank paid, was not the check which the plaintiff drew. Any unauthorized alteration of a bill or a check after acceptance or issuing, is a forgery: *Master v. Miller*, 4 T. R. 320; *Hall v. Fuller*, 5 B. & C. 750 (E. C. L. R. vol. 11), 8 D. & R. 464 (E. C. L. R. vol. 16); *Young v. Grote*, 4 Bingh. 253 (E. C. L. R. vol. 13), 12 J. B. Moore, 484 (E. C. L. R. vol. 22); and a banker cannot debit his customer with a payment made to one who claims through a forged instrument: *Roberts v. Tucker*, 16 Q. B. 560 (E. C. L. R. vol. 71).

Cur. adv. vult.

CRESSWELL, J., now delivered the joint opinion of Williams, J., Willes, J., and himself:—

*This case depends upon the effect to be given to the statute 19 & 20 Vict. c. 25, an act to amend the law relating to drafts [*538 on bankers. Before the statute was passed, a customer of a banker, by drawing a check and writing across it the name of another banker, did not limit the authority of the drawee to paying the party or firm whose

name was so written across it. It did not amount to a direction to the drawee, but had the effect of calling for vigilance on his part; and, where a banker had paid otherwise than to the party so designated, it was held that the question was, not whether he had acted contrary to orders, but whether he had been guilty of negligence. It formed no part of the instrument itself, and in no way altered its effect: see the judgment of Parke, B., in *Bellamy v. Marjoribanks*, 7 Exch. 403.†

This statute was passed for the purpose of making such matter written across a check, whether written by the drawer or payee, operate as a direction to the banker to pay in that mode, and to render the check payable in that mode only. The words of the statute are,—“Whereas doubts have arisen as to the obligations of bankers with respect to cross-written drafts: and whereas it would conduce to the ease of commerce, the security of property, and the prevention of crime, if drawers or holders of drafts on bankers payable to bearer or to order on demand, were enabled effectually to direct the payment of the same to be made only to or through some banker:” be it therefore enacted, that, “in every case where a draft on any banker made payable to bearer or to order on demand bears across its face an addition, in written or stamped letters, of the name of any banker, or of the words ‘and company,’ in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is *539] made, that the same *is to be paid only to or through some banker, and the same shall be payable only to or through some banker.”

Now, this, I apprehend, does not apply to the time when the check is issued; for, the preamble contemplates the crossing of a check, not by the drawer only, but also by the holder, whoever he may be. Nor can it be construed as if the words had been “If a check, &c., at any time bears;” for, if, after it is issued uncrossed, a holder may have the benefit of the enactment by crossing it, why should not another holder have a right to erase that, and restore it to the condition in which it was issued? Considering this and also the difficulty of holding that anything can operate as a direction to the banker which is not exhibited to him, I think the statute must mean that the check is to bear the crossing when presented. If so, the check in question did not bear it, and the banker was not prohibited from paying it otherwise than to or through a banker.

But it is further to be considered whether the crossing was part of the check, so that the erasure of it would amount to a forgery of another and different check from that which the plaintiff drew; for, if it had that effect, the plaintiff never drew the check that was paid, and the banker cannot claim credit for it.

In the first place, it does not appear that the legislature contemplated making the crossing a part of the check. The statute says that it

shall have the force of a direction, not that it shall alter the instrument, if it were to have that effect, it would be a strange thing to give to the payee or any subsequent holder power to alter a check without avoiding it, and would have the effect of creating a new sort of instrument, hitherto unknown to the law, viz., a check payable to bearer, or conditionally, that is, if presented by or through a banker. Again, it seems strange to enact that one *holder may cross a check, and a subsequent holder may not erase that crossing, and restore it to the condition in which it was issued. If he may, then, at all events, the crossing can only be part of the check as long as it remains upon it. [*540]

Another reason for holding it not to be a part of the check, so as to make the erasure operate as a forgery of a new check, is this, that, in such case, if a check once crossed with a banker's name, afterwards erased, were presented *by or through a banker, and paid* (which is all that is required in the case of a check bearing the crossing when presented), the banker could not claim credit for the payment so made,—a result which the legislature does not appear to have contemplated or intended.

COCKBURN, C. J.—I think it right to say that it is not until after considerable hesitation that I have brought myself to concur in the view taken by the rest of the court in this case: not that I entertain any doubt that the direct and immediate operation of the act of parliament was to make bankers responsible for the payment of checks when crossed in the manner which the act of parliament has pointed out, only where a check, *when presented*, has a crossing upon the face of it: but it occurred to me, on the view I at first took of this case, that, although the legislature had not contemplated making the banker responsible in a case like the present, yet such would nevertheless be the indirect effect of the statute, inasmuch as, the legislature having now made this crossing of the check equivalent to a direction contained in the check to the banker not to pay except the check be presented through another banker, any alteration of the check when once so made by the drawer would be a forgery, and therefore the payment by the banker of the instrument,—it having now *become a forged instrument,—would not be available to him to credit himself against the drawer. [*541]

Upon more mature deliberation, however, I am led to think there is a fallacy in this view, and that my learned Brothers are right in holding that the crossing of the check is not any part of the check itself: and, although it is true that while, before the statute, the crossing merely had the effect of making it incumbent on the banker to use greater caution in the payment of the check, it now operates as a positive and peremptory direction to him not to pay except under given circumstances; and, therefore, it might perhaps be said that the crossing is to be taken as though the drawer had drawn the check in this form,—
“Pay to A. B. or bearer, provided the bearer be a banker, or the check

is presented through a banker." Although that might appear, at first sight, to be the effect of the enactment in the statute, still it is, after all, only an addition, in the shape of a direction in the check, having no greater operation than a separate written direction would have, if, after having drawn the check, the drawer had written to the banker desiring him not to pay, except the check were presented through a banker. I think, therefore, that it is the more correct view to hold that the crossing is a direction made in addition to the check,—which is the language also of the statute;—that it is not an integral portion of the check (as I was originally inclined to think), but an addition to the check, and independent of the check, and, consequently, that any alteration in that respect would not amount to a forgery, and that it cannot, therefore, be said that the banker is still liable as having paid a forged check. I think, therefore, after a good deal of hesitation and doubt, that my learned Brothers are right in the view they take; and I concur in their judgment.

Rule discharged.

*542] *DIMMACK and Another v. BOWLEY and Another.

June 5.

The 137th section of the 12 & 13 Vict. c. 106, enacts that every judge's order made by consent given by a trader defendant, authorizing the plaintiff to sign judgment and issue execution, shall be filed with the clerk of the dockets and judgments in the Court of Queen's Bench within twenty-one days, otherwise the order, and any judgment or execution thereon, shall be null and void to all intents and purposes whatever.

A., a trader, gave B. a judge's order for payment of a certain debt and costs to be taxed: the costs were duly taxed, and the amount of debt and costs paid; and afterwards, and within twenty-one days from the date of the order, B. caused it to be filed:—Held, that he had a right to do so.

Held, also, that, whether the statute made the filing of the order under the circumstances imperative or not, no action would lie against B. for filing it, inasmuch as it could not be said to have been done without reasonable or probable cause.

If the filing had been an unauthorized act,—*semble* (per Williams, J.), that the declaration would be sufficient without an allegation of want of reasonable or probable cause.

THE declaration stated, that, before the committing of the grievances thereafter mentioned, and after the commencement of The Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), by a certain order called a judge's order, dated the 2d of January, 1857, made by consent, given by the now plaintiffs, then being traders and iron manufacturers, in a certain personal action then pending in the Court of Exchequer of Pleas at Westminster, wherein the now defendant Samuel Bowley was plaintiff, and the now plaintiffs were defendants, by the Right Hon. Sir F. Pollock, the Chief Baron of the said court, the said Chief Baron did order that all further proceedings in that case should be stayed, on payment of 67*l.* 6*s.* 8*d.* the debt, and costs to be taxed, and that, in default of payment of the said debt and costs, or any part thereof respectively, as aforesaid, the now defendant Samuel Bowley

should be at liberty to sign final judgment and issue execution for the whole amount remaining unpaid at the time of such default, with the costs of judgment and execution, sheriff's poundage, officers' fees, and all other incidental expenses, whether by fi. fa. or ca. sa., or both; which said costs of the said cause due to the now defendant Samuel Bowley were afterwards duly taxed by one of the masters of the said court at the sum of 10*l.* 14*s.* 6*d.*; which sum was thereupon inserted and written by the said master in and upon the said judge's order as the amount of the *said costs: that thereupon the now plaintiffs afterwards, [*543 to wit, on the 5th of January aforesaid, paid the said two sums of 67*l.* 6*s.* 3*d.*, and 10*l.* 14*s.* 6*d.*, mentioned in the said judge's order as the amounts of the said debt and costs respectively, to the now defendant Samuel Bowley, in one sum of 78*l.* 0*s.* 9*d.*, who then accepted and received the said last-mentioned sum of the now plaintiff in payment and full satisfaction and discharge of the said debt and costs in the said judge's order mentioned and ordered to be paid as aforesaid; yet the now defendants, although they and each of them, before and at the time of the committing of the grievances thereafter mentioned, had notice of the said judge's order, and of the amounts of the said debt and costs therein mentioned, and of the said payment and acceptance of the said sum of 78*l.* 0*s.* 9*d.* in full satisfaction and discharge of the said debt and costs in the said judge's order mentioned, but intending to injure the now plaintiffs in their credit and trade as iron-masters, notwithstanding the said payment of the said debt and costs in the said judge's order mentioned, and to cause it to appear that the said judge's order still remained unsatisfied, and that the said debt and costs therein mentioned and ordered to be paid as aforesaid still remained wholly unpaid, and that the estate and property of the now plaintiffs was charged the amount thereof, and in order to put the now plaintiffs to costs, inconvenience, and expense, after the said payment of the said debt and costs, and after the said notice to the now defendant of the payment thereof as aforesaid, and within twenty-one days after the said making of the said judge's order, to wit, on the 19th of January aforesaid, wrongfully, unjustly, and maliciously, under colour and pretence of the Bankrupt Law Consolidation Act, 1849," filed a true copy of the said judge's order, together with an affidavit of the time of the consent *being given by the now plaintiffs to the said judge's order, and a description of the residence and occupation [*544 of the now plaintiffs, with the officer then acting as clerk of the dockets and judgments in the Court of Queen's Bench, without informing the said officer, or giving him any notice whatever, that the said debt and costs in the said judge's order mentioned, or either of them, or any part thereof, had been paid, or that the said judge's order had been in any wise satisfied; whereby the said officer of the Court of Queen's Bench was induced to and did forthwith cause the said copy of the said

judge's order so filed as aforesaid to be numbered, and the names, and additions, and descriptions of the now plaintiffs, as the persons giving the said order, and also the name, addition, and description of the now defendant Samuel Bowley as the person in whose favour the said judge's order had been given, together with the date of the making of the said judge's order, and of the filing of the said copy of the said judge's order, and the sum for which judgment was, pursuant to the said judge's order, to be entered up, to be respectively entered in an alphabetical list in a book in his said office, pursuant to the statutes in such case made and provided; whereby, upon such filing of the said copy of the said judge's order, and such entry in the said book, as aforesaid, it did then appear from, in, and by the said copy of the said judge's order so filed as aforesaid, and the said entry in the said book, that the said debt and costs in the said judge's order mentioned, and therein ordered to be paid as aforesaid, were still due and unpaid by the now plaintiffs to the now defendant Samuel Bowley, and that the said judge's order was an existing unsatisfied charge against the estate and property of the now plaintiffs in favour of the now defendant Samuel Bowley, to the amount of the debt and costs in the said judge's order mentioned:

*545] by means of *which said several premises, and by reason of its appearing from the said copy of the said judge's order so filed as aforesaid, and from the said entry in the said book so induced to be made as aforesaid, that the debt and costs mentioned in the said judge's order were due and unpaid by the now plaintiffs to the now defendant Samuel Bowley, and that the said judge's order was an existing unsatisfied charge against the estate and property of the now plaintiffs in favour of the now defendant Samuel Bowley, to the amount of the debt and costs in the said judge's order mentioned, the credit and trade of the now plaintiffs, as iron manufacturers as aforesaid, had been and were greatly injured; and the now plaintiffs had been put to great inconvenience, costs, charges, and expenses in and about causing it to appear to Channell, B., one of the Barons of the said court, that the said debt and costs for which the said judge's order given as a security as aforesaid had been paid and satisfied as aforesaid, and in thereupon obtaining from the said Baron an order that a memorandum of satisfaction should be written upon the said copy of the said judge's order so filed as aforesaid, and in and about procuring the said officer of the Court of Queen's Bench, in pursuance of the said Baron's order, to write a memorandum of satisfaction upon the said copy of the said judge's order so filed as aforesaid: Claim, 500*l*.

To this declaration the defendants demurred,—the grounds of demurrer stated in the margin, being, “that the declaration does not allege that the defendants knew that the judge's order need not be filed, nor aver any want of reasonable or probable cause for filing the order; and that, the costs having been taxed and paid under the order,

it was necessary to file the order, to prevent its being avoided by the bankruptcy of the plaintiffs." Joinder.

**Honyman*, in support of the demurrer.—The declaration [*546 discloses no cause of action. The order, in substance, was, that, upon payment of the debt, and costs to be taxed, the proceedings should be stayed. The 137th section of the 12 & 13 Vict. c. 106, expressly enacts "that every judge's order, made by consent, given, after the commencement of this act, by any such trader, defendant in any personal action, and whereby the plaintiff in such action shall be authorized forthwith after the making of such order, or at any future time, to sign or enter up judgment, or to issue or take out execution in such action, and whether such order shall be made subject to any defeasance or condition or not, in case the action in which such order shall be made shall be in the Court of Queen's Bench,—or, in case the action wherein the same is made shall be in any other court, a true copy of such order,—shall, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the dockets and judgments in the said Court of Queen's Bench within twenty-one days after the making of such order, in like manner as a warrant of attorney in any personal action, and a *cognovit actionem* given by any defendant in any personal action, or copies thereof, and affidavits of the execution thereof, respectively, may be filed with the said clerk within the space of twenty-one days after such warrant of attorney or *cognovit actionem* shall have been executed, *otherwise such judge's order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be null and void to all intents and purposes whatever.*" If the want of filing makes the order a nullity, the taxation would be without justification, and the plaintiff in the action might be called upon to refund the amount of the allocatur. [WILLIAMS, *J.—Might you not have filed the order specially, with a memorandum showing that it had been satisfied?] The [*547 137th section goes on to provide for the mode of entering satisfaction, —in the manner pointed out in the 3 G. 4, c. 39. It is submitted that the defendants have done all that was incumbent on them towards compliance with the act. Assuming, however, that the defendants were not *bound* to file the order, the question is whether they have incurred any legal liability by so doing. There is no averment here that the defendants were actuated by malicious motives, or that they acted without reasonable or probable cause, which, according to the opinions of Lord Mansfield and Lord Loughborough in *Johnstone v. Sutton*, 1 T. R. 544, is essential. Those learned judges say: "The essential ground of this action,(a) is, that a legal prosecution was carried on *without a probable cause*. We say this is emphatically the

(a) For a malicious prosecution.

essential ground; because every other allegation may be implied from this; but this must be substantively and expressly proved, and cannot be implied. From the want of probable cause, malice may be, and most commonly is, implied. The knowledge of the defendant is also implied. From the most express malice, the want of probable cause cannot be implied. A man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this kind of action.”(a) And in *Musgrove v. Newell*, 1 M. & W. 582, 587,† Lord Abinger says: “There is no doubt as to the principles of law by which such cases are governed; and they cannot be better laid down than in the case of *Johnstone v. Sutton*. To *548] support *an action of this kind, there must be both malice in the defendant, and a want of reasonable and probable cause.” *Flight v. Leman*, 4 Q. B. 888 (E. C. L. R. vol. 45), 1 Dav. & M. 67, still further illustrates this principle. In *De Medina v. Groves*, 10 Q. B. 152 (E. C. L. R. vol. 59), it was held that no action lies against an execution-creditor or his attorney for issuing a *fi. fa.* endorsed to levy the whole sum recovered by a judgment, which, *to the knowledge of both*, has been partly satisfied by payments, unless malice and want of probable cause be alleged in the declaration, and proved: and this was affirmed by the Exchequer Chamber, on error,—10 Q. B. 172,—where Wilde, C. J., in delivering the judgment of the court, says: “The law allows every person to employ its process for the purpose of trying his rights, without subjecting him to any liability, unless he acts maliciously and without probable cause. The question arising upon this record, is, whether the action is maintainable without the usual averments of malice and want of probable cause. Even if there be a sufficient statement of malice in this declaration, there is no sufficient statement of the want of probable cause.” The absence of an averment of the want of reasonable and probable cause, was also held fatal in *Roret v. Lewis*, 17 Law Journ. Exch. 99. The case of *Gibbs v. Pike*, 9 M. & W. 851,† comes very near to the present case. There, in a suit in equity, an order was made that one G. should pay in to the name of the Accountant-General, in trust in the cause, a certain sum admitted by his answer to have been the amount of the sale of a trust-fund; and the solicitor for the plaintiff in the suit registered it under the 1 & 2 Vict. c. 110, s. 19, and G. was in consequence prevented from disposing of his lands: and it was held that the registering of the order was not of itself a wrongful act, and that no action could be maintained for it without proof of malice. Lord Abinger there says: “No doubt *549] the plaintiff in this case has suffered great prejudice; *but he has done so in common with all others who are unfortunately placed in the same predicament with himself: and I cannot see, that, in

(a) See *Warren v. Matthews*, 6 Med. 73.

registering this order, the defendant Pike did more than it was proper for him to do as an attorney acting for the benefit of his client in a suit in equity. If he were guilty of a mistake in unnecessarily registering this order, I do not see how it could operate to the injury of the plaintiff; for, the register refers to the order, which would speak for itself, and which any one is at liberty to inspect: and therefore, even assuming the argument to be well founded, that this was an order not proper to be registered, no one could make a mistake, or be misled by that circumstance; since, unless supported by the order, the registry is a nullity as to any effect it might have on the property of any person, and therefore cannot work any injury. On the other hand, if it is a matter of doubt whether or not a particular order of this kind ought to effect the benefit conferred by the late act, of binding the estate of the party, this would be a proper case to register it; for, here we have a trustee who admits, by his answer in Chancery, that the trust-funds were remaining in his hands, and the attorney had good reason to think that his real estate would be subject to the order of the court: but, even supposing him to be wrong in this view, still, if there were a reasonable doubt on the subject, there was a probable cause for his registering the order." So, here, the plaintiffs might have caused satisfaction to be entered on the order, and then any person inspecting the register would see that it no longer remained a charge against him: and, if there were any reasonable doubt whether the order ought to have been filed or not, there was probable cause for filing it. *Churchill v. Siggers*, 3 Ellis & B. 929 (E. C. L. R. vol. 77), is also an authority to show that malice and want of probable cause were essential to the maintenance of this action.

* *Winston*, *contra*.(a)—The order in question clearly ought not to have been registered after the debt and costs had been [*550 paid. The preamble of the 3 G. 4, c. 39,—which statute is to be taken in *pari materia* with the 137th section of the 12 & 13 Vict. c. 106,—shows that the sole object of the legislature in requiring these orders to be filed, was, to prevent a bankrupt's property from being swept away by means of a secret execution. It is said that it was necessary to file this order, because the statute declares that the order unless filed shall be "null and void to all intents and purposes whatever;" and, inasmuch as the order was the only authority for the taxation of the costs, if that were void, the party might have been

(a) The points marked for argument on the part of the plaintiffs, were,—

"That it sufficiently appears from the declaration that the defendants must have known that the judge's order need not be filed, and that they had no reasonable or probable cause for filing it; and that it was unnecessary to file the order after the payment of the debt and costs, because, in case of the bankruptcy of the plaintiffs, the validity of either payment would not depend on the order or be avoided by the avoidance of the order, but would be good irrespective of any judge's order at all; and because the statute 12 & 13 Vict. c. 106, s. 137, which was intended to prevent the mischief of secret judges' orders for signing judgment or issuing execution, does not render it necessary to file any such order which has been already satisfied."

called upon to refund the money. There clearly is no foundation for that; for, the transaction would be protected by the 133d section. The words "null and void to all intents and purposes whatever" are to receive a reasonable construction. In *Bryan v. Child*, 5 Exch. 368,* they were held to mean that the order shall be null and void, not as against the trader himself, but only as against his assignees: and there is nothing in the 137th section to take away the protection given by the *551] 133d. In *Farrow v. Mayes*, 18 Q. B. 516, an order which had *not been duly filed pursuant to the 12 & 13 Vict. c. 106, s. 137, was held void as against the assignees of the party giving it, and they recovered back the amount paid under the execution, as money had and received to their use. The rules of Hilary Term, 1853, were made after the decision of that case; and the 28th of those rules provides that "the costs of filing a judge's order for judgment against a trader defendant, under the bankrupt act, shall not be allowed unless specially ordered by the judge,"—showing that the filing is by no means a matter of course. [COCKBURN, C. J.—Why is a party to run the risk of the order being avoided for want of filing? Or, why should he be held liable to an action for being perhaps over cautious?] The gist of this action is malice: *Reynolds v. Kennedy*, 1 Wils. 232; *Heath v. Heape*, 26 Law J., M. C. 49. Here, the declaration sufficiently shows malice; and it was not necessary also to aver want of probable cause. In *Saxon v. Castle*, 6 Ad. & E. 653 (E. C. L. R. vol. 33), 1 N. & P. 661 (E. C. L. R. vol. 36),—which was an action for a malicious arrest,—the judgment was arrested, not because the declaration omitted to aver the absence of probable cause, but because it alleged only that the defendant had "wrongfully and injuriously" delivered the writ to the sheriff, not adding "maliciously." [WILLES, J.—If you choose to deviate from the customary form of pleading, and to set out the facts of the case, you must take care that they necessarily show want of reasonable and probable cause.] If the court are not of opinion that the judge's order ought to have been filed, the plaintiff would pray leave to amend. [CRESSWELL, J.—It is enough to say that it is not clear that the order should not have been filed.]

Honyman, in reply, was stopped by the court.

COCKBURN, C. J.—I am of opinion that the judgment of the court *552] upon this demurrer should be for the *defendants. The 137th section of the 12 & 13 Vict. c. 106, provides that every judge's order made by consent given by a trader defendant, authorizing the plaintiff to sign or enter up judgment, or to issue or take out execution, shall be filed with the clerk of the dockets and judgments in the Court of Queen's Bench, within twenty-one days, otherwise such judge's order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be null and void to all intents and purposes whatever. It seems to me to be unnecessary

to decide whether the filing of the order in question was essential to the protection of the defendants against liability to refund the money in the event of the bankruptcy of the debtors; for, I think, that, at all events, where an act of parliament prescribes that a certain thing shall be done, although it may be contended that under particular circumstances it might be unnecessary to comply with the requisition of the act, the party whose rights may be put in peril by its omission has a perfect right to do the thing prescribed, for his own protection; and that, where he does only what the act prescribes, his so doing cannot be made a ground of action of this kind. Therefore, though I am far from saying that the enactment in question does not make the filing of the order an act of imperative necessity, yet, assuming that it was not necessary to file it, I still think the defendants had a perfect right to do so for their protection against any demand that might have been made upon them, in the event of a bankruptcy, to refund the money, on the ground of its being an unauthorized payment. It is contended, that, if it was unnecessary to file the order, and it was filed vexatiously and maliciously, the person filing it would be liable to an action. Still it would be incumbent on the plaintiff in such an action to aver the want of reasonable and probable cause for filing it; *and there [*558 is no such averment here. Probably that defect might be cured by an amendment. But the question is whether that averment could be proved. The whole argument proceeds upon this, that it is matter of considerable doubt whether the statute does not require the order to be filed, to give it permanent efficacy, and to protect the party from being called upon to refund the money paid under it. The very existence of the doubt would be a clear answer to the charge that the act of filing was without reasonable and probable cause. I am therefore of opinion that there is no ground of action.

CRESWELL, J.—I am of the same opinion. The statute imposes it as a duty upon the person obtaining the order, to cause it to be filed, and it inflicts upon him a penalty for a neglect to perform that duty, by declaring that the consequence of its non-performance shall be that the order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be null and void to all intents and purposes whatever. Even supposing that no such penal consequences were to ensue, still, inasmuch as the statute expressly says that the order shall be filed, I think the defendants had a right to file it, and that no action will lie against them for so doing.

WILLIAMS, J.—I am of the same opinion. I think the defendants had a right to file the order, to protect themselves from the consequences which might have resulted from an omission to do so. Having that right, does it make any difference that they did it maliciously? One who has a right to prefer an indictment, is not liable to an action for preferring it, even although in so doing he is actuated by malicious

motives. If, however, the statute gave the defendants no right to file a *paid order, in declaring against them for so doing I think it *554] would not have been necessary to aver the want of reasonable and probable cause. It would be enough to show that the filing it was an unauthorized act, and malicious.(a)

WILLES, J.—I also am of opinion that the defendants are entitled to judgment. If the 137th section be closely looked at, I think it will clearly appear that the order must be filed within the prescribed time, to give it any efficacy. Seeing that the judge's order must be filed even if execution is issued upon it, I do not see why it should not be filed where the amount is paid without execution, inasmuch as the order might be necessary to sustain the payment: *Reynolds v. Wedd*, 4 N. C. 694, 6 Scott, 699. The defendants had a right to preserve the order as a valid order, although paid; and they could only do that by causing it to be filed under the 137th section of the Bankrupt Law Consolidation Act.

Judgment for the defendants.

(a) See the authorities collected in the note (c) to the case of *Skinner v. Gunter*, 1 Wms. Sessd. 230 a.

*555] *THE LONDON AND NORTH WESTERN RAILWAY COMPANY, Appellants; GRACE, Respondent. June 5.

A county court judge having stated a case (upon appeal) in so confused a manner that the court could not discover whether or not he meant to present a question of law for their decision,—the case was remitted to him for amendment in this respect.

Upon the case coming back, it clearly appeared to involve no question of law. The court, under the circumstances, dismissed the appeal, *without costs*.

THE following case was stated by way of appeal against a decision of the judge of the county court of Cheshire:—

The plaintiff was an engine-driver, in the employ of the defendants; and the action was brought to recover three months' wages from the defendants. The particulars attached to the summons were as follows:—

“This action is brought for the recovery of 27l. 6s. The plaintiff, on or before the 29th of December last, was a servant of the said railway company, and was on that day, without previous notice, and without just cause, discharged from the said service by the company. The company ought to have given three months' notice to the plaintiff before discharging him; therefore the plaintiff claims three months' wages, that is to say, 42s. a week for thirteen weeks; the aggregate amount being the 27l. 6s. for which this action is brought.”

The following is a copy of the agreement entered into by the plaintiff with the company, being the usual agreement on hiring engine-drivers:—

“ London and North Western Railway.

“ I, the undersigned, agree to subscribe to, obey, and be bound by the rules and regulations of the London and North Western Railway Company, and also to comply with the orders of the company's superior officers, and to submit to any fine not exceeding 20s., or dismissal, for a fault, under the authority or with the sanction of the directors, by the superintendent of the locomotive engine department. And I agree to give or *to receive a three months' notice before leaving the employ, with the understanding that I be allowed to leave [*556 with a fortnight's notice, if I can show the superintendent that I have an offer of better pay elsewhere, or am going to leave Great Britain. The rate of wages is to be 7s. per day. Dated, &c.

(Signed) “ JOHN GRACE.

“ I, John Bolas, on behalf of the company, hereby agree to the above terms.

(Signed) “ J. BOLAS.”

It was proved on the trial that the plaintiff was dismissed, with the sanction of the directors, for having, as they alleged, on the night of the 23d of December last, failed to see a danger-signal, and run into a goods train, which had been brought to a stand by want of water, on the line between Chester and Crewe. It was admitted, on the one hand, that the plaintiff had been fined two months before for a similar offence, and, on the other hand, that he had been eighteen years in the service of the company, and had risen through every grade in that department of the service.

On the part of the plaintiff, it was proved, that he left Holyhead, in charge of the mail-train to Crewe, shortly after 8 o'clock in the evening ; that the journey, before reaching Chester, had been one of extreme difficulty, on account of frost and the slippery state of the rails, a sudden fall of snow and sleet, and the inclemency of the night ; that, between Rhyl and Chester, the snow was so deep that the train could not proceed, and the plaintiff and a fellow-servant had been obliged to leave the engine, and clear away the snow from the rails ; that it was two hours (within five minutes) behind time on arriving at Chester, in consequence of which the Chester section of the train to London had already started in charge of the guard who usually accompanied both sections of the train when united at *Chester, and the person who acted as guard of the plaintiff's train from [*557 Chester on the night in question was a railway porter, who occasionally acted as a supernumerary guard ; that, at the time the collision took place, which was near 2 o'clock in the morning, the plaintiff was going at his proper and accustomed speed of thirty-five miles an hour ; and that the moment he saw the lights of the goods train, he did all that was possible to stop his own train ; but that the trains were then less than eight hundred yards apart, and it was too late to prevent the collision.

On the part of the defendants, it was proved that the danger-signal in the rear of the goods train into which the plaintiff ran, might have been seen by him at a very considerable distance,—at least twelve hundred yards,—and in ample time to enable him to pull up his train, if he had seen it; and it was contended that not seeing the lights and stopping in time was a sufficient “fault” to warrant the dismissal without notice.

The judge held, that, to constitute a “fault” within the meaning of the plaintiff’s engagement, there must at least be culpable negligence; that, admitting all that had been proved by the defendants as above stated, and that the plaintiff had failed to see the lights for from 15 to 25 seconds after they might have been descried, still that was not a “fault,” to warrant his dismissal at a moment’s notice.

If the ruling of the learned judge was wrong, the verdict was to be entered for the defendants.

Bovill, Q. C. (with whom was *Phipson*), for the appellants.—The substance of the case is, that the plaintiff, an engine-driver, omitted to see a danger-signal, which it is found as a fact he ought to have seen: and that is the ground of dismissal. [CRESSWELL, J.—I doubt whether *558] the case is so stated as to enable us to say that *that is the finding. Although the light might be discernable, the plaintiff may have been guilty of no default. But if, through a negligent want of look out, the plaintiff caused the accident, as at present advised, I should say that that would be a fault that would justify instant dismissal.] The judge finds that the plaintiff failed to keep a look out, and that there is no excuse for his neglect. [CRESSWELL, J.—No doubt there is evidence of negligence: but I doubt whether there is a sufficient finding of negligence. Would this statement amount to a sufficient finding in a special verdict?] Possibly not. [COCKBURN, C. J.—The judge seems to draw a distinction between culpable and pardonable negligence. Suppose we are prepared to say that *any* negligence would justify a dismissal, that minor degree of negligence has not been found.] The judge construes the agreement as matter of law. [CRESSWELL, J.—He has evidently adopted the word “culpable” from some recent cases of manslaughter.] He has clearly found a failure on the part of the plaintiff in the performance of an important duty.

Knowles, Q. C. (with whom was *Macnamara*), for the respondent.—The court has no jurisdiction to entertain this appeal, the judge, sitting as a jury, having disposed of the matter. The 13 & 14 Vict. c. 61, s. 14, only gives jurisdiction to the superior court where “either party is dissatisfied with the determination or direction of the said court in *point of law*, or upon the admission or rejection of any evidence.” [CRESSWELL, J.—What the judge finds, is, not that the plaintiff was guilty of no negligence, but that nothing in the shape of

negligence amounts to a "fault" but *culpable* negligence: and that is matter of law. WILLIAMS, J.—Upon what point do you understand the county court judge to ask the opinion of this court?] Upon the question of *negligence. The facts set out do not show negligence; and the judge has not found it. [CRESSWELL, J.—Was [*559 it not negligence on the plaintiff's part not to see the lights when he might and ought to have seen them?] The court has no jurisdiction, unless it can see that the county court judge made a mistake in construing the word "fault." [COCKBURN, C. J.—If he means to say, that, to amount to a fault, there must be something more than negligence in the ordinary acceptation of the term, I do not agree with him. WILLIAMS, J.—The true criterion is in the statement of the degree of duty, not of negligence. An engine-driver may be bound to use extraordinary care; and, if he omits that, he is guilty of negligence. What is the duty of an engine-driver? CRESSWELL, J.—In substance, the county court judge finds that the plaintiff might have seen the lights, but did not; and he finds that does not amount to a "fault."'] Giving effect to all the other circumstances stated in the case, it really amounts to a finding of culpable negligence. [COCKBURN, C. J.—It is negligence, with mitigating circumstances. CRESSWELL, J.—If the county court judge means to find that a certain state of circumstances does not in point of law amount to a fault within the meaning of the agreement of hiring, we may entertain the appeal: but I think he ought to state what he finds to have been the facts. COCKBURN, C. J.—If the judge means to say that "negligence" in an engine-driver is not a fault, I do not agree with him. He uses a term which implies something more than negligence. If he means to say, that, under the circumstances, the man was not guilty of any negligence at all, it is better that he should so state. The case must be remitted to him for amendment in this respect.]

The case having been accordingly remitted to the *learned judge for amendment, was returned by him with the following [*560 supplemental remarks:—

"The plaintiff did everything in his power to prevent the accident, the moment he saw the light. The means he had recourse to would probably have stopped his train in 800 yards, as was ascertained by experiments subsequently made. The night had been most inclement, with much snow and sleet: but the state of the atmosphere at the moment of the collision did not precisely appear, beyond the fact that there was no fog. On a fine night, such a light might generally be perceived at a distance of 1200 yards or upwards. The stoker was engaged in putting coals on the fire when the plaintiff first saw the light, and could give no opinion as to whether he might not have seen it sooner. It was not stated that the plaintiff was short-sighted: but stress was laid upon his extraordinary and protracted exertions on the

night in question, upon the state of the weather, and upon the fact that the luggage-train had no business upon the line at all until the mail-train had passed.

"There was no direct evidence of misconduct or neglect of duty: but I was called upon, on behalf of the defendants, to infer from the foregoing facts that the plaintiff could not have kept such a look out as he was bound to do, and had been properly dismissed.

"Acting in the place of a jury, I was of opinion that there was not sufficient proof of negligence to warrant a dismissal, in the ordinary relation of master and servant: but, by binding the plaintiff 'to submit to any fine not exceeding 20s., or dismissal, for a fault, under the authority or with the sanction of the directors, by the superintendent,' the defendants, no doubt, intended to reserve to themselves a more extensive power than the law alone would give them; and, if they are *561] at liberty to say to their servants, 'The *meaning of our agreement is, that every complaint will be investigated, and, if the superintendent reports you guilty of a fault, and his finding shall be sanctioned and confirmed by the directors, you will be liable to be fined or dismissed, as the case may be, and without appeal,'—then I had no jurisdiction, and the verdict cannot be sustained: but, if, to constitute a 'fault' within the meaning of the agreement, misconduct or negligence is necessary, and such proof as would satisfy a jury that the plaintiff was guilty either of misconduct or of negligence, then the verdict ought to stand."

Bovill, Q. C., for the appellants.—On the former occasion, the county court judge submitted to the court a question of law. [*COCKBURN*, C. J.—We sent the case back to him because we thought he was mistaken in supposing it to involve any question of law.] He now presents it as a mere question of fact,—stating a conclusion at which he does not seem to have arrived at the trial. [*CRESSWELL*, J.—He finds, as a matter of fact, that there was no evidence to satisfy him that the plaintiff had been guilty of misconduct or of negligence.] He has not found a single fact to justify the plaintiff in failing to see the lights in time. The proper course, it is submitted, under the circumstances, would be to send the case down to a new trial.

Knowles, Q. C., *contra*, was stopped by the court.

COCKBURN, C. J.—Upon the facts as now found by the county court judge, the case presents no difficulty. Our decision must be for the respondent: but, under the circumstances, I do not think it would be right to dismiss the appeal with costs. The fault was in the judge so inartificially stating the case in the first instance. The probability is, *562] that, if it had originally *been stated as it now is, the case would not have been resisted.

Knowles.—It was not the respondent's fault that the judge mistook his duty in stating the case.

CRESSWELL, J.—The county court judge has now deprived the defendants of the right of appeal, by placing his decision upon the fact. I agree with the Lord Chief Justice in thinking that there should be no costs.

The rest of the court concurring,

Appeal dismissed without costs.(a)

(a) As to costs, see *Gibbon, App., Gibbon, Resp.*, 13 C. B. 205, 219 (E. C. L. R. vol. 76); *Liedemann, App., Schultz, Resp.*, 14 C. B. 38, 52 (E. C. L. R. vol. 78); *Foster, App., Smith, Resp.*, 18 C. B. 161 (E. C. L. R. vol. 86). And see *Fothergill, App., Walton, Resp.*, 14 C. B. 295 (E. C. L. R. vol. 78).

*BARRICK and Others v. BUBA and Another. June 5. [*568

A declaration of war by this country against a foreign power, imports a prohibition of commercial intercourse with the subjects of that power.

Held, therefore, that a plea to an action upon a charter-party made between a subject of this country and a Russian subject for loading a cargo at Odessa, a Russian port,—that, at the time of making the contract, the plaintiff was a subject of Great Britain and the vessel a British vessel, and the defendant a subject of Russia residing and carrying on trade there, and that, before the expiration of the time for the defendant to load the vessel according to the charter-party, and before any breach thereof, a state of war existed, and had ever since continued, between the two countries,—was a good answer.

Held also, that a mere intimation by the agent of the charterer at Odessa to the master, before the time for loading had expired, that “he had ceded the charter-party, with all its rights and obligations,” to a third person, and that he must address himself to such third person for a cargo, did not amount to a renunciation of the charter-party, so as to entitle the owner to sue as for a breach at that time.

THIS was an action for breach of a charter-party.

The declaration stated, that, by a charter-party dated the 1st of November, 1853, it was mutually agreed between the plaintiffs, owners of the ship *Lavinia*, and the defendants, merchants, that the said ship, being tight, staunch, and strong, and in every way fitted for the voyage, should with all convenient speed after discharge of her outward cargo at Odessa, or so near thereto as she might safely get, there load from the factors of the defendants a full and complete cargo of tallow, wheat, seed, or other stowage goods, or grain, at the option of the defendants, and, being so loaded, should therewith proceed to a safe port in the united kingdom, or so near thereto as she might safely get, and deliver the same afloat, on being paid freight; the cargo to have been brought to and taken from alongside at charterers' expense and risk; the ship's boats and crew to have rendered all customary assistance in towing the lighters, &c.: forty running days to have been allowed the said merchants (if the ship was not sooner despatched) for loading and unloading; and, if half or more of the cargo consisted of wool, ten additional lay days were to have been allowed; and ten days on demurrage over and above the said laying *days, at 5*l.* per [*564 day; the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation,

of what nature and kind soever during the said voyage, always excepted: and it was thereby further agreed, that, *in the event of hostilities breaking out which would prevent the said vessel from loading at Calcutta, the said charter-party was to be null and void*: Averment, that, within a reasonable time after the making of the said charter-party, the said ship arrived at Odessa, and there discharged her outward cargo, and was then, to wit, on the 15th of March, 1854, there ready to load from the factors of the defendants a full and complete cargo according to the terms of the said charter-party, of which the defendants had due notice: Breach, that, although the plaintiffs fulfilled and performed all conditions precedent necessary to entitle them, and they became and were entitled, and demanded of the defendants, to have the said ship or vessel loaded as aforesaid, and were always up to and at the time of the refusal of the defendants thereafter mentioned, ready and willing to receive a cargo on board of the said vessel, and to keep and detain their said vessel at Odessa aforesaid, for the purpose of being loaded, for the said lay days, and, if half or more of the cargo had consisted of wool, for the said ten additional lay days in the charter-party mentioned, and, if thereunto requested, for the said demurrage days, or any of them, and to do and perform all things on their part according to the said charter-party, of which the defendants had notice,—yet the defendants did not nor would, at any time during the lay days mentioned in the said charter-party (which had expired before the commencement of this suit), or since, load the said vessel according to the said charter-party, but, on the contrary thereof, wholly refused *565] so to do, and before the *expiration of the lay days discharged the plaintiffs from further keeping or detaining the said vessel for the purpose of being so loaded; by reason whereof the plaintiffs not only lost and were deprived of the freight that they would otherwise have earned according to the said charter-party, but were put to great expense and cost in and about attempting to procure another cargo for the said ship or vessel, and were otherwise greatly damaged, &c.

The defendants pleaded,—first, that it was not agreed as alleged in the declaration.

Secondly, that the said ship was not and did not continue ready to load, and that the plaintiffs were not and did not continue ready and willing to receive and load in and on board of such ship a full and complete cargo, and to keep and detain the said vessel at Odessa, according to the true intent and meaning of the said charter-party.

Thirdly, that the defendants had no notice that the said ship was and continued ready, and that the plaintiffs were and continued ready and willing to load or receive a cargo according to the said charter-party in and on board of the said ship, as alleged, and to keep and detain the said vessel at Odessa for that purpose.

Fourthly, that, after the making of the said agreement, and before the time had elapsed for the defendants to load the said vessel, according to the said charter-party, and before any breach thereof by the defendants, hostilities broke out, within the true intent and meaning of the said agreement, which would have prevented the loading of the said vessel at Odessa according to the charter-party, and which did, according to the true intent and meaning of the charter-party, prevent the defendants loading the said vessel at Odessa aforesaid; and that such hostilities had ever since continued; whereby the said charter-party became void.

*Fifthly, that one of the provisions contained in the said charter-party was, that the act of God, the Queen's enemies, [*566 *restraint of princes and rulers,*(a) fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage, were and should be always *mutually*(a) excepted; and that, before any breach by the defendants of the said charter-party, and thence hitherto, the defendants were hindered and prevented loading the said ship according to the charter-party, by the Queen's enemies *and the restraint of princes and rulers,*(a) within the true intent and meaning of the charter-party in that behalf.

Sixthly, that Odessa, in the said agreement mentioned, at the time of the making of the said agreement was, and ever since had been, and still was, part of the dominions of the Emperor of all the Russias, and that, at the time of making the said agreement, the plaintiffs were and still are subjects of Her Majesty Queen Victoria, and that the said ship Lavinia was, and thence hitherto had been and was, a British vessel belonging to the plaintiffs, being such British subjects as aforesaid; and that the defendants were not British subjects, and were during all the time aforesaid residents in Russia, and carrying on trade and commerce there, subjects of the said Emperor, and enemies of Her said Majesty Queen Victoria; and that, before the time had elapsed for the defendants to load the said vessel according to the said charter-party, and before any breach thereof by the defendants, a state of war existed and had ever since continued between Her Majesty Queen Victoria and the said Emperor of all the Russias.

Seventhly, that the defendant did not refuse to load the said vessel, and discharge the plaintiffs from further *keeping and detaining [*567 the said vessel for the purpose of being so loaded.

Eighthly, that, before the time allowed for loading the said vessel had expired, and before any breach of the charter-party by the defendants, and before any discharge by the defendants of the plaintiffs from further keeping or detaining the said vessel for the purpose of being loaded, the said vessel departed and left the place where she was to have been loaded by the defendants according to the charter-party, and

(a) These words were not in the charter-party.

never returned thereto; and that the plaintiffs thereby prevented the defendants from loading the said vessel there according to the true intent and meaning of the charter-party.

The plaintiffs joined issue on the first, second, third, and seventh pleas of the defendants, and took issue on the fourth, fifth, sixth, and last pleas.

They also demurred to the sixth plea,—the ground of demurrer stated in the margin being, “that the state of war did not put an end to the contract between the plaintiffs and defendants, nor did it, in consequence of the existence of a state of war, become illegal by the law of England for the defendants to load or for the plaintiffs to receive a cargo.” Joinder.

The issues of fact came on to be tried before Jervis, C. J., at the sittings in London after Trinity Term, 1855, when a verdict was taken for the plaintiffs, subject to the opinion of the court upon the following case:—

The *Lavinia* was chartered by the plaintiffs to the defendants on the 1st of November, 1853, under the following charter:—

“New ship. 10 years.

“London, 1st November, 1853.

“Memorandum for charter.

*568] “It is this day mutually agreed between Henry *Barrick, Esq., for himself and co-owners of the good ship or vessel called the *Lavinia*, of London, A. 1, coppered, of the burthen of $3\frac{2}{3}$ tons register admeasurement, or thereabouts, whereof A. E. is master, now at Whitby, and Messrs. Buba, Brothers, London, merchants,—That the said ship, being tight, staunch, and strong, and every way fitted for the voyage, with all convenient speed, after discharge of outward cargo at Odessa, or so near thereunto as she may safely get, shall there load from the factors of the said freighters a full and complete cargo of tallow, wheat, seed, or other stowage, or grain, at the option of the freighters, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, shall forthwith proceed to a safe port in the united kingdom (both inclusive), or so near thereto as she may safely get, calling at Cork or Falmouth, at the master’s option, for orders (which are to be given by return of post, in reply to the captain’s letter to the charterers, or lay days to commence), and deliver the same afloat, on being paid freight as follows:—

From Odessa.	To the United Kingdom.				
	£	s.	d.		
For tallow	5	10	0	Per ton of 20 cwt. gross.	To a safe port between Havre and Hamburg, 10 per cent extra.
Five pounds ten shillings.					

Other stowage goods, seed, or grain, if any, in proportion according to the London Baltic printed rates, being in full of all port-charges, and pilotage as customary. The freighter engages to provide the necessary mats for dunnage. The cargo to be brought to and taken *from [569 alongside at charterers' expense and risk; the ship's boats and crew to render all customary assistance in towing the lighters, &c. (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage always excepted); one-half of such freight to be paid in cash on unloading and right delivery of the cargo, and the remainder by an approved bill on London at three months' date, or in cash, less discount, at the merchants' option. Forty running days are to be allowed the said merchant (if the ship is not sooner despatched), for loading and unloading; and, if one-half or more of the cargo consist of wool, ten additional lay days to be allowed; and ten days on demurrage over and above the said laying days, at 5*l.* per day. Detention by frost not to be reckoned as lay days. Cash for ship's use at port of loading, not exceeding 150*l.*, to be advanced the master, free of interest and commission, against the captain's bills on the owners, which they hereby engage to accept, and, if not duly paid, to be deducted from the freight, with interest and insurance. Penalty for non-performance of this agreement, 2000*l.*

"HENRY BARRICK.

"BUBA, BROTHERS."

The *Lavinia* arrived at Odessa on the 6th of February, 1854, with a cargo of coals. She remained in quarantine there until the 16th of February; and on the 17th she went into the mole to discharge her cargo.

On the 11th of February, the master of the *Lavinia*, John Crutwell, wrote and forwarded to one of the defendants the following letter:—

"Odessa, February 11th, 1854.

"Mr. Buba.

"Dear Sir,—I beg to inform you of the arrival of the barque *Lavinia*, under my command, chartered by your *house in London. I have attended the *Palatoria* every day since my arrival [570 on the 7th instant, and have not had the pleasure of seeing you there. May I beg an interview with you on the forenoon of the 14th instant, between 11 and 12 o'clock.

"Yours, &c.

"JOHN CRUTWELL."

The *Palatoria* mentioned in the above letter is a place on the quay at Odessa where the masters of foreign ships and merchants meet and communicate. To this letter the defendants wrote the following, dated the 18th of February:—

"Odessa, 6 (18) Fevrier, 1854.

"A Monsieur le Capitaine J. Crutwell,
commandant du navire Anglais, Lavinia (au port).

"Nous avons l'honneur de vous annoncer que nous avons cédé votre charter-party à M. Kellner: c'est lui qui vous donnera votre chargement; et c'est nous qui vous donnerons vos expéditions. Ecrivez nous une lettre lorsque vous serez prêt à recevoir votre chargement, et dites nous de combien de mattas vous avez besoin. Nous avons l'honneur d'être

"BUBA, FRERES."

The Lavinia commenced discharging her outward cargo of coals on the 20th of February, and completed the discharge on the 14th of March. On the last-mentioned day, the following letter was received by the defendants from the captain:—

"Odessa, Tuesday, March 14, 1854.

"Messrs. Buba, Brothers.

"Gentlemen,—This present is to give you notice that the barque Lavinia, under my command, is now ready to receive cargo, and that the lay days according to the terms of the charter-party begin and count to-morrow, Wednesday, March the 15th. Messrs. Maho Menzer will transfer the consignment of the Lavinia to you, and you will pay *571] all expenses in town. You will also *oblige by sending me the permit to load in due time. I beg to observe that there are several vessels loading wheat yet.

"Yours, &c.

"JOHN CRUTWELL."

The Lavinia was ready to load her cargo on the 15th of March.

Previously to the 14th of March,—about four or five days before the coals were discharged,—the captain saw Mr. Buba, who was acting for the defendants, personally, and told him the day that he would be about ready, and desired Mr. Buba to prepare him a cargo; in answer to which Mr. Buba said,—“Mr. Kellner will provide you your cargo.”

The captain, in his evidence, stated that at that time there were reports of hostilities, but that he himself had no apprehension.

On the 15th of March, the following letter was received by the defendants from the captain:—

"Odessa, Wednesday, March 15th, 1854.

"Messrs. Buba, Brothers.

"Gentlemen,—I beg to refer you to the Lavinia's charter mutually agreed to between Henry Barrick, Esq., for himself and owners, and Messrs. Buba, Brothers, London, merchants, and freighters of the Lavinia. You will there see I am to load from you (the factors of the said freighters) a full and complete cargo of tallow, wheat, seed, or other stowage goods, or grain, at the option of the freighters.

"Now, as it is said the exportation of bread-stuffs is prohibited, and that it is quite improbable you will be able to ship a cargo of bread-stuff, and that war is inevitable between Great Britain and Russia, I

beg of you to ship any cargo you are liable to by the charter, without loss of time. This day is the first lay day of the *Lavinia*. I do therefore enter this protest, and beg of you to accept it as such, against Messrs. *Buba, Brothers, of London, merchants, freighters of [*572 the *Lavinia*, against Messrs. Buba, Brothers, of Odessa, consignees of the *Lavinia*, and factors of Messrs. Buba, Brothers, of London, against all losses, damages, expenses, freight, dead-freight, or demurrage, and penalty, as per charter, that may arise from not shipping any cargo you are liable to by the charter, and which it is not prohibited from this day to the day after when it may be impossible for either of us to ship the *Lavinia*'s cargo, whether from a declaration of war or hostilities occurring between Great Britain and Russia.

“Yours, &c.

“JOHN CRUTWELL,

“Master of the *Lavinia*”

Shortly after this, and on several occasions, as well before as after the declaration of war against Russia, the captain applied to one of the defendants, and asked him for a cargo. The defendant said,—“No. I have already informed you I have ceded your charter-party to Mr. Kellner. Go to Mr. Kellner for your cargo.” The captain several times afterwards asked the defendant for a cargo, and always received the same answer, viz., “Go to Mr. Kellner for your cargo.” The captain did accordingly go on more than one occasion to Mr. Kellner, who said,—“I have nothing to do with your cargo: Mr. Buba is your merchant.”

On the 28th of March, war was declared by Her Majesty against Russia; and, on the 6th of April, the declaration of war between Great Britain and Russia was known at Odessa.

The captain, on cross-examination, stated, that, on the 17th of April, there was a difference of opinion among ships' captains there, as to whether vessels would be allowed to leave Russia; that he was not seriously afraid of his vessel being detained; that he thought there was a possibility of his being detained by the *Russians; that, on [*573 the 17th of April, he wrote a letter to Mr. Menzer; that, after writing the letter, he met Mr. Menzer the following day at the Palatoria, as he might meet anybody else, and consulted him as to whether it was safe for the vessel to remain at Odessa; that it was after that interview, but not until he had received the answer of Mr. Buba to his letter of the 17th of April, hereinafter set out, that he gave directions to Mr. Menzer to clear his vessel out immediately; and that, as soon as he got his clearances, he moved out from the usual loading place.

On the 17th of April, the captain wrote and sent the defendants the following letter:—

"Odessa, April 17th, 1854.

"Quarantine.

"Messrs. Buba, Brothers.

"Gentlemen,—This present is to inform you, that, on Sunday next, April the 23d, the forty running lay days of the Lavinia expire according to the charter. At the expiration of those days, I will clear out and sail, and obtain the highest rate of freight possible elsewhere for charterers' benefit, unless you wish the Lavinia to lay the demurrage days named in the charter also. In that case, you must request me to do so, in writing, through the captain of the port's office, before the days expire.

"Yours, &c.

"JOHN CRUTWELL."

"P. S. If you consider hostilities have occurred that prevent the Lavinia from loading at Odessa, please say so; and you will oblige by writing me in English immediately on receipt of this."

To this letter the captain received for answer:—

"Odessa, 6 (18) April, 1854.

"Lavinia, Quarantine.

"Captain J. Crutwell.

*574] "Sir,—At your arrival at Odessa, we have informed *you that we have ceded your charter-party, with all its rights and obligations, to Messrs. George Kellner & Co., of this city, merchants. We beg again now, therefore, to address you for all your claims to those gentlemen as possessors of your charter-party.

"We remain, &c.

"BUBA, BROTHERS."

On the 18th of April the captain wrote the following:—

"Odessa, 18th April, 1854.

"Mr. Kellner.

"Sir,—I enclose a copy of a letter I wrote Messrs. Buba on Monday, the 17th instant; also their answer to that letter. On receipt of this, you will oblige me much by writing to me this day, informing me if you are going to load the Lavinia or not, and on what grounds you decline loading the Lavinia, if that is your determination. I have ordered the clearance of the vessel this morning: and my reason for so doing before the lay days expire, is, that the Custom House will be closed in a day or two, according to the rites of the Russo-Greek Church, and will not again be opened until four or five days after the Lavinia's lay days expire. Therefore, if it is your intention to load the Lavinia, you must let Mr. Costa know before he clears this ship out, as the lay days are nearly expired, and I would wish to come to a fair understanding with all concerned previous to my departure, which will not be before the

lay days expire. I will instruct Mr. Costa to hand you my letter before he clears the ship out.

"Yours, &c.

"JOHN CRUTWELL.

"P. S. Observe, I am ready at any time to take in cargo. It is only for you to send cargo, and I will take it on board."

The allied fleets came into the Odessa roads on the *20th of April; and, when the fleets came in on that day, the *Lavinia*, [*575 having obtained her clearances outwards as for an empty vessel, was taken by the captain out of the harbour, which is the usual loading place, into the Odessa roads. She went out from the mole into the Odessa roads, and there lay off the mole, and astern of the fleets.

The Custom House being about to close, on account of a religious holiday, the vessel could not have been cleared out after the 20th of April until several days after the expiration of the lay days, if she had not been cleared out on the 20th.

If the *Lavinia* had been loaded with cargo, she would have required fresh clearances. Without a clearance, the vessel would not have been allowed to sail.

The captain stated that he intended to lay in the mole until the lay days expired, if the fleet had not appeared; but that, owing to the appearance of the fleet, he went out of the mole into the roads.

Between the 14th of March and the 20th of April, several English vessels, all of which had come into the mole after the *Lavinia*, were loading with cargoes of tallow, linseed, and wool.

On the 22d of April, Odessa was bombarded by the British and French fleets.

The *Lavinia* lay in the roads of Odessa until the 25th of April, when she sailed for Constantinople.

The captain, being asked by the plaintiffs' counsel, "Was there anything to prevent the defendants communicating with you if they wanted?" said, "They might have sent a note off to us if they pleased."

The *Lavinia* could have been loaded with tallow, seed, or grain in the space of four days: but a cargo of wool would have required a longer time.

The *Lavinia* was and is a British registered ship. The plaintiffs were and are British subjects. The *defendants were and are [*576 Russian subjects, and carrying on business at Odessa. Odessa is a Russian port; and the war had continued ever since 1854 between England and Russia until this action was brought.

The pleadings were to form part of the case; and the court was to draw the same inferences and conclusions of fact that a jury might.

The question for the opinion of the court, was, whether the plaintiffs were entitled to recover in this action. If the court was of that opi-

nion, the verdict for the plaintiffs was to stand for an amount to be determined by arbitration. If the court was of a contrary opinion, a verdict was to be entered for the defendants accordingly, and on such issues as the court should direct, and for the plaintiffs on the other issues.

James Wilde, Q. C. (with whom was *Unthank*), for the plaintiffs.—Since the case of *Esposito v. Bowden*, 29 L. T. 295, it may be considered as settled that a declaration of war puts an end to all contracts between British subjects and foreigners, which are to be performed in the enemy's country.^(a) The judgment *must, therefore, be for the defendants upon the demurrer to the sixth plea. Upon the special case, the question will be whether there was a breach of the charter-party before the declaration of war; and that question is altogether independent of that decided in *Esposito v. Bowden*. By the charter-party the charterers were to be allowed a certain number of lay days, and ten days additional at 5*l.* per day. The *Lavinia* arrived at Odessa on the 6th of February, 1854. On the 14th of March she had completed the discharge of her outward cargo, and was ready to load under the charter on the 15th. On the 28th, war was declared between this country and Russia; and it was known at Odessa on the 6th of April. The breach relied on is, that, on being informed that the *Lavinia* was ready to load, the charterers' agents informed the master that the contract had been ceded to Kellner, and referred him to Kellner for a cargo. This took place before the date of the declaration of war. No cargo being provided, the master waited until the lay days expired, and then sailed away. [WILLIAMS, J.—When do you say that a breach occurred?] When the defendants renounced the contract, and the master, acting upon that renunciation, applied to Kellner for a cargo. In *Reid v. Hoskins* and *Avery v. Bowden*, 6 Ellis & B. 953 (E. C. L. B. vol. 88), there was no renunciation of the contract by the defendants below, or acceptance of such renunciation by the plaintiffs below, before the date of the declaration of war.^(b) [COCKBURN, C. J.—Notwithstanding the cession by the charterers of the benefit of the contract to Kellner, would it not have been competent to them afterwards to furnish a cargo?] If *any one* had provided a cargo, the plaintiff would have sustained no damage. But here, the charterers profess to

(a) In delivering the judgment of the Court of Exchequer Chamber in that case, WILLES, J. says: "It is now fully established, that, inasmuch as the presumed object of war is, as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the crown, is illegal." "The sovereign of this country has the right to proclaim war, with all its consequences; enforcing or mitigating them either generally or in particular instances, as may be thought best by her government. One of those consequences, not removed or dispensed with by any treaty, order in council, or license, or by any special circumstances of necessity in the particular case, is, that trade and dealing with the enemy, unless expressly permitted, are forbidden."

(b) See *Reid v. Hoskins*, 4 Ellis & B. 979 (E. C. L. B. vol. 82), 5 Ellis & B. 729 (E. C. L. B. vol. 85); *Avery v. Bowden*, 5 Ellis & B. 714.

be no *longer bound by the charter-party; and Kellner also refuses to ship a cargo. [COCKBURN, C. J.—The mere fact of the [*578 defendants having arranged with Kellner for furnishing a cargo, does not amount to a renunciation of the contract. We must look at the whole facts. As late as the 18th of April, the master is in communication with the Messrs. Buba about the loading.] In *Hochster v. De La Tour*, 2 Ellis & B. 678 (E. C. L. R. vol. 75), the plaintiff declared on an agreement to employ him as a courier, from a day subsequent to the date of the writ,—averring that, from the time of the agreement, till the refusal by the defendant after mentioned, he (the plaintiff) was ready and willing to perform his part of the contract; and alleging for breach, that, before the day for the commencement of the employment, the defendant refused to perform the agreement, and discharged the plaintiff from performing it, and wrongfully wholly put an end to the agreement. Upon motion in arrest of judgment, it was held, that a party to an executory agreement may, before the time for executing it, break the agreement, either by disabling himself from fulfilling it, or by renouncing the contract, and that an action will lie for such breach before the time for the fulfilment of the agreement; and that it sufficiently appeared on the face of the declaration that there was on the part of the defendant, not merely an intention to break the contract, of which intention he might repent, but a renunciation communicated to the plaintiff, on which the plaintiff was entitled to act; and, consequently, that the plaintiff was entitled to judgment. So, here, the defendants have no right to affect to absolve themselves from the contract by ceding their rights under it to another. [COCKBURN, C. J.—They do not absolve themselves from the contract: on the contrary, their very assertion that they have transferred their rights under it to another, keeps the contract *alive.] They absolutely ignore the [*579 master's claim on them for a cargo, and refer him to Kellner; and the master thereupon addresses himself to Kellner. Their letter of the 18th of April expressly speaks of their having ceded the charter-party, "with all its rights *and obligations*," to Kellner. That is, in effect, saying that they will have nothing further to do with the contract. [WILLIAMS, J.—Could the master have refused to receive a cargo from Kellner within the lay days?] That would depend upon whether or not he had attorned to Kellner. [COCKBURN, C. J.—Would the master of the *Lavinia* have been justified in sailing away immediately upon his receiving the intimation from Messrs. Buba that they had ceded their rights under the charter-party to Kellner?] It is submitted that he would: he was not bound to receive a cargo from anybody else. [COCKBURN, C. J.—Was he not bound to wait for the lay days to run out?] No. *Reid v. Hoskins*, and *Avery v. Bowden*, show that the renunciation must be acted upon at the time. [COCKBURN, C. J.—No doubt, where the contract is entirely repudiated.] It is difficult to

reconcile *Hochster v. De La Tour* with the cases in the Exchequer Chamber. Here, the renunciation was complete at the time; or, at all events, it became so when the master went to Kellner. A contract is broken when the party incapacitates himself from performing it: *Love-lock v. Franklyn*, 8 Q. B. 371 (E. C. L. R. vol. 55). [COCKBURN, C. J.—I do not find that the master ever foregoes his claim upon the charterers for a cargo.] If once there was a complete renunciation, acted upon by the master, he had no power afterwards to waive the breach. [COCKBURN, C. J.—*Avery v. Bowden*, 5 Ellis & B. 714 (E. C. L. R. vol. 85), is a distinct authority to show that the charterer's saying "I cannot perform the contract," does not amount to a breach until the expiration of the time stipulated by the contract for its performance.

*580] It is no renunciation: he *does not affect to say that he thereby gets rid of his obligation. In that case, the defendant by a charter-party agreed to load a cargo on board the plaintiffs' ship at Odessa. To a count for not loading, the defendant pleaded, that, before the cause of action arose, war was declared between Great Britain and Russia, which rescinded the contract. It appeared, that, after the ship had arrived, and before the declaration of war, the defendants' agent had repeatedly told the master that he, the agent, had no cargo for the ship, and that he had better go away: but the master continued to require a cargo till the declaration of war was known at Odessa, which was before the ship's laying days had expired: and it was held, that the refusal of the agent before the time for loading had expired, not being acted on as a renunciation of the contract, was not a cause of action, and that the plea was therefore proved.] Bubas' last letter clearly shows that they intended to repudiate all obligation to load under the charter-party. In *Cort v. The Ambergate Railway Company*, 17 Q. B. 127 (E. C. L. R. vol. 79), it was held, that, on a contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods, gives notice to the vendor not to manufacture any more, as the purchaser has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the supply, such vendor may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract. Lord Campbell there says: "Was there not evidence that the defendants refused to accept the residue of the chairs? If they had said, 'Make no more for us, for we will have nothing to do with them,' was not that refusing to accept or receive them according to the contract?" *Here, there was, it is submitted, an absolute renun-

*581] ciation of the contract by the agents of the charterers, acted upon by the master by his placing the vessel at the disposal of Kellner, and consequently a complete breach before the date of the declaration of war.

Bovill, Q. C., *contra*.—The case is disposed of by *Avery v. Bowden*, 5 Ellis & B. 714 (E. C. L. R. vol. 85), 6 Ellis & B. 953 (E. C. L. R. vol. 88). [He was stopped by the court.]

COCKBURN, C. J.—I am clearly of opinion that this case falls within the principle of the decisions of the Exchequer Chamber in *Avery v. Bowden*, and *Esposito v. Bowden*. There was no breach before the day upon which the declaration of war between this country and Russia took place. The defendants, therefore, are entitled to judgment.

CRESSWELL, J.—I am entirely of the same opinion. The sixth plea is disposed of by the judgment of the Exchequer Chamber in *Esposito v. Bowden*; and the defendants are entitled to our judgment on the special case upon the authority of *Avery v. Bowden* and *Reid v. Hoskins*.

WILLIAMS, J.—Not only do I agree with my Lord and my Brother Cresswell that this case is governed by the decisions in *Avery v. Bowden*, *Reid v. Hoskins*, and *Esposito v. Bowden*, but I feel bound to add that I dissent entirely from every word of Mr. *Wilde's* argument.

WILLES, J.—I also think that the defendants are, as well upon principle as upon authority, entitled to our judgment both upon the demurrer to the sixth plea and upon the special case.

Judgment for the defendant.

The *Rapid*, 1 Gall. 295; The *St. Lawrence*, Id. 467; The *Joseph*, Id. 545.

After a declaration of war, an American citizen cannot lawfully send a vessel to the enemy's country to bring away his property; and if he does, the property may be captured and condemned as enemy property: The *Rapid*, 8 Cranch, 155.

A state of war puts an end to all

executory contracts between the citizens or subjects of the two nations at war: The *Francis*, 1 Gallis. 448; *Brown v. The United States*, 8 Cranch, 110.

No valid contract, express or implied, except for the payment of ransom money, can arise or subsist between a citizen of this country and the enemy, without the permission of government: *Griswold v. Waddington*, 16 Johns.

438.

*582]

*EMERY v. CLARK. *June 5.*

A discharge of the principal under the insolvent debtors act, 1 & 2 Vict. c. 110, does not exonerate him from the claim of a surety on a bond, in respect of payments subsequently made under it by the latter.

THIS was an action of debt for money paid by the plaintiff for the defendant, and for money found due from the defendant to the plaintiff on accounts stated between them.

The defendant pleaded,—first, never indebted,—secondly, that, before the commencement of this suit, to wit, on the 13th of July, 1854, by the order and adjudication then made by the judge of the county court of Essex, pursuant to the acts then in force for the relief of insolvent debtors in England, at the county court of Essex holden at Chelmsford, before the said judge on that day, he the defendant was duly and pursuant to the acts then in force for the relief of insolvent debtors in England, discharged of and from the said several causes of action in the declaration mentioned, and each and every of them,—which said order remained in force thitherto.

Issue having been joined upon these pleas, the following case was, pursuant to a judge's order made by consent, stated for the opinion of the court:—

By a certain bond, dated the 19th of July, 1852, and on that day duly executed by the several obligors therein named, being the above-named defendant and plaintiff, one John Edie, and one W. L. Clark, these four persons became held and firmly bound to William Hopkinson in the sum of 1000*l.*, to be paid to the said William Hopkinson, or to his certain attorney, executors, administrators, or assigns, for which payment they the defendant, the plaintiff, John Edie, and W. L. Clark, *583] bound themselves, and each of them, and any two and any three of them, their and each of their heirs, executors, and administrators, jointly, severally, and respectively, firmly by the said bond.

The said bond was subject to a certain condition thereunder written for (amongst other things) the payment by the said obligors to the said William Hopkinson of the debt or principal sum of 522*l.*, with interest for the same at the rate of 5*l.* per cent. per annum, by certain instalments and on certain days in the said condition mentioned; and also, until the whole of such principal sum and interest should be fully paid and satisfied as in the said condition mentioned, from time to time duly and punctually paying to the National Provident Institution in the said condition mentioned (amongst other sums) the annual premium of 6*l.* 10*s.* 8*d.* at least fifteen days before the last day on which the same was to be paid, in order to keep on foot a certain policy of assurance in the said condition mentioned.

[A copy of the bond and condition was set out in the case.]

The plaintiff and the said John Edie and William Lewis Clark

respectively became parties to and executed the said bond as sureties for and at the request of the defendant, and not otherwise.

The defendant made default in payment of the two instalments of 58*l.* each which according to the said condition became due on the 19th of July, 1853, and the 19th of January, 1854.

After the said bond was executed by the said obligors, after such default, and on the 31st of May, 1854, the defendant, then being a prisoner for debt in the gaol of Springfield, in the county of Essex, according to the statutes in that behalf then in force petitioned the court for the relief of insolvent debtors in England for *his [*584 discharge from such custody and imprisonment, and filed his petition and schedule in that behalf in that court; and having given the plaintiff due notice according to the insolvent debtors act then in force, was, on the 13th of July, 1854, discharged pursuant to the acts then in force for the relief of insolvent debtors in England, by the order of adjudication then in that behalf made by the judge of the county court of Essex, pursuant to those acts, at the county court of Essex holden at Chelmsford before the said judge on that day.

[Copies of the petition and order of adjudication were set out in the case.]

The following is a copy of so much of the schedule filed by the defendant upon his application for his discharge under the insolvent debtors act, as relates to the said William Hopkinson, and the debt owing from the defendant to him :—

No.	Names and descriptions of creditors and claimants, and their present or last residences.	Amount.			When contracted.	Admitted or disputed.	Nature and consideration of the debt, and securities, if any; also if the debt is disputed, the reason thereof.
		£.	s.	d.			
2	William Hopkinson, sen., Paul's Wharf, Upper Thames street, London, Corn merchant.	416	16	6	1852	Admitted.	The balance due to this creditor for money lent. The original amount was 557 <i>l.</i> 9 <i>s.</i> 2 <i>d.</i> , for which I gave this creditor a bond dated 12th January, 1852, in which W. Emery, W. L. Clark, and John Edie (creditors No. 3), joined as my sureties. The loan was payable by instalments. I paid the first instalment, and Mr. Emery paid the second; but default was made in payment of the third instalment. This creditor has commenced an action against me and my said sureties.
			and				
		into	re	st.			

*The following is a copy of so much of the said schedule filed by the defendant as relates to the plaintiff and the said John Edie and W. L. Clark :—

[*585

No.	Names and descriptions of creditors and claimants, and their present or last residences.	Amount.			When contracted.	Admitted or disputed.	Nature and consideration of the debt, and securities. If any; also, if the debt is disputed, the reasons therefor.
		£.	s.	d.			
	William Emery, Blackwall, Middlesex, cooper, W. L. Clark, Upper North Street, Poplar, London, broker, and H. Edie, Bow, Middlesex, ironfounder, and W. Papineau, Stratford, Essex, chemist; the two last being executors of John Edie, late of Bow, Middlesex, ironfounder, deceased.	416	16	6	1852	Admitted as to liability.	The amount these creditors are liable to pay to Mr. W. Hopkinson, creditor No. 2, on the bond above-mentioned, as my sureties, and for which an action has been commenced against them.

After the defendant was discharged under the insolvent debtors act, as aforesaid, the plaintiff, under and by virtue of the said bond, and the condition thereof, and as the surety in that behalf of the defendant, and not otherwise, was required to and did pay to the said William Hopkinson, on account and in payment and discharge of certain instalments and interest, that is to say, the last six instalments of 58*l.* each in the said condition mentioned, which after such discharge as aforesaid became due and payable to the said W. Hopkinson under and by virtue of the said bond and condition, and of interest due and payable under and by virtue of the said condition, paid to the said W. Hopkinson six sums of money together amounting to 377*l.* 0*s.* 1*d.*

*586] *The following table or account states and shows the day on which each of the said six instalments paid as aforesaid became due, the sum paid as aforesaid by the plaintiff in discharge thereof and of certain interest due under and by virtue of the said bond and condition, and the day on which each such sum so paid by the plaintiff was so paid: each instalment paid by the plaintiff, and the sum paid in discharge thereof and of interest, are in such account on one and the same line:—

Dates when instalments paid by the plaintiff became due.	Amounts of instalments paid by the plaintiff.	Dates of payments by the plaintiff.	Sum paid. £. s. d.
19 July, 1854	58 <i>l.</i>	3 Aug., 1854	30 0 0
		28 Aug., 1854	36 14 0
19 January, 1855	58 <i>l.</i>	22 Jan., 1855	65 5 0
19 July, 1855	58 <i>l.</i>	19 July, 1855	63 16 0
19 January, 1856	58 <i>l.</i>	23 Jan., 1856	62 7 0
19 May, 1856	58 <i>l.</i>	11 Aug., 1856	59 18 0
19 October, 1856	58 <i>l.</i>	15 Nov., 1856	58 10 6

£377 0 1

After the defendant was discharged under the insolvent debtors act as aforesaid, and on the 22d of December, 1854, the plaintiff under and by virtue of the said bond and the condition thereof, and as the surety in that behalf of the defendant, and not otherwise, was required to and did pay to the said National Provident Institution in the said condition mentioned the premium or sum of 6*l.* 10*s.* 8*d.*, which, after the defendant was discharged as aforesaid, and on the 22d of November, 1854, became payable to the same institution for keeping on foot the said policy of assurance.

On the 18th of December, 1855, under and by virtue of the said bond and the condition thereof, and as the surety in that behalf of the defendant, and not otherwise, the plaintiff was called upon and required to and did pay to the said institution the further premium or *sum of 6*l.* 10*s.* 8*d.*, which after the defendant was discharged [587 as aforesaid, and on the 22d of November, 1855, became payable to the same institution for keeping on foot the said policy of assurance.

This action was brought to recover the several sums paid by the plaintiff as aforesaid, and together amounting to 890*l.* 1*s.* 5*d.*

The court were to be at liberty to draw any inference of fact which a jury might have drawn upon a trial at Nisi Prius; and the case was to be amended as the court might direct.

The question for the opinion of the court, was, whether or not the defendant's discharge under the insolvent debtors act was an answer or defence as to the plaintiff's demand or any part thereof.

If the court should be of opinion that such discharge was an answer or defence as to the whole of the plaintiff's demand, then the plaintiff agreed that a judgment of nolle prosequi should and might be entered against him immediately after the decision of this case, or otherwise, as the court might think fit.

But, if the court should be of opinion that such discharge was an answer or defence as to only a part of the plaintiff's demand, then the defendant agreed that for that part of the plaintiff's demand, that is to say, for that part of the said sum of 890*l.* 1*s.* 5*d.* with respect to which the court should be of opinion that the said discharge was not an answer or defence, judgment should be entered against him by confession, immediately after the decision of the case, or otherwise, as the court might think fit.

And, if the court should be of opinion that such discharge was not an answer or defence as to any part of the plaintiff's demand, then the defendant agreed that judgment should be entered against him by confession for the whole of the said sum of 890*l.* 1*s.* 5*d.*, *immediately after the decision of the case, or otherwise, as the court [588 might think fit, and that judgment should be entered accordingly.

Rowley, for the plaintiff.—The defendant's discharge under the insolvent debtors act did not, it is submitted, exonerate him from liability to

pay the sums sought to be recovered in this action, which became due subsequently to the date of the vesting order. By the 75th section of the 1 & 2 Vict. c. 110, the court is empowered to adjudge the insolvent to be entitled to the benefit of the act "as to the several debts and sums of money due or claimed to be due at the time of making such vesting order as aforesaid, from such prisoner to the several persons named in his schedule as creditors, or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order as aforesaid, and which were not then payable, and as to the claims of all other persons, not known to such prisoner at the time of such adjudication, who may be endorsees or holders of any negotiable security set forth in such schedule so sworn to as aforesaid." The 80th section enacts "that the discharge of any such prisoner so adjudicated as aforesaid shall and may extend to any sum and sums of money which shall be payable by way of annuity or otherwise at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever, and that every person and persons who would be a creditor or creditors of such prisoner for such sum or sums of money, if the same were presently due, shall be admissible as a creditor or creditors of such prisoner for the value of such sum or sums of money so payable as aforesaid, which value the said court shall, upon application at any time made in *589] that behalf, ascertain, regard being had to the original *price given for such sum or sums of money, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the time of making such vesting order as aforesaid; and such creditor or creditors shall be entitled in respect of such value to the benefit of all the provisions made for creditors by this act, without prejudice, nevertheless, to the respective securities of such creditor or creditors, excepting as respects such prisoner's discharge under this act." The sums claimed here are not sums of money payable by way of annuity or otherwise by virtue of any bond, covenant, &c.: they are sums of money claimed by virtue of a rule of law, implying a promise on the part of the principal to repay the surety any sums he may be called upon to pay on his behalf. It is the payment, and not the bond, that constitutes the liability. In *Powell v. Eason*, 1 M. & Scott, 68, 8 Bingh. 23, it was held that one who was discharged under the insolvent debtors act 7 G. 4, c. 57, was not exonerated from the claim of a surety on a promissory note which had become due before the insolvent presented his petition, but which the surety was not called on by the creditor to pay until after the discharge of the principal. Tindal, C. J., after referring to the 10th and 47th sections of the statute, proceeds: "Was, then, the plaintiff a creditor of the defendant at the time of presenting or filing his petition? The plaintiff was, then only a surety for the payment of a promissory note due from

the defendant to Mary Bell. There was no debt as between the plaintiff and the defendant, and consequently the plaintiff was not a creditor of the defendant at the time of his discharge, and therefore he does not fall within the words or meaning of either of those clauses of the act. In confirmation of this view of the subject, we find, that, in the last act for the amendment of the laws relating to *bankruptcy [590 (6 G. 4, c. 16), which was passed in the year preceding that in which the statute in question was passed, it was found necessary to introduce a clause to relieve bankrupts from the claims of sureties and other persons who were liable for the bankrupt's debts." He then refers to the 52d section of the 6 G. 4, c. 16, and concludes thus,— "But there is no such auxiliary clause in the act now before us, from which we may infer that the legislature did not intend a surety for a bankrupt to stand in the same situation as a surety for a person who became insolvent, or that the same relief should be granted to the latter as to the former." And that is confirmed by a subsequent case of *Abbott v. Bruere*, 7 Scott, 753, 5 N. C. 598 (E. C. L. R. vol. 35), where it was held that the grantor of an annuity, notwithstanding his discharge under the insolvent debtors act, is liable to his surety for payments made on account of the annuity subsequently to the discharge, though due before.

The court called on

David Keane, for the defendant.—The object of the statute evidently was, that the adjudication should enure as a complete discharge of the insolvent from *all* his debts. To hold that it does not extend to a demand of this sort, would be to make him indirectly liable in respect of a debt from which he has been directly discharged. In all the cases where the insolvent has been held to be liable notwithstanding the adjudication, the decision has proceeded upon the ground that there could be no valuation of the debt. Thus, in *Brown v. Fleetwood*, 5 M. & W. 19,† 7 Dowl. P. C. 387, where A. purchased of B. his business of an attorney, the purchase-money to be paid by two instalments, and the conveyance contained a proviso giving A. the power, within a limited time, either of completing the purchase or giving B. notice of his abandonment of the contract, in which *case B. was to repay 50*l.* of the purchase-money,—it was held that B.'s discharge under the [591 insolvent debtors act before the expiration of the time limited for giving such notice, was no answer to an action to recover back the 50*l.* after such notice given, for that it was not a contingency capable of valuation at the time of the insolvency. Parke, B., there says: "It is clear that the insolvent is not discharged from any debt which cannot be proved before his discharge. It is different in the case of bankruptcy, where the debt may either be valued at the time of the bankruptcy, or the party may wait until the contingency occurs. In the case of insolvency, there is no provision for future valuation: the insolvent is dis-

charged only from such debts as are capable of valuation at the time of the insolvency. It is perfectly clear that this was not: it was wholly uncertain at that time whether the business would be profitable or not, or whether the plaintiffs would choose to give it up or not." Here, however, the thing is susceptible of valuation.

PER CURIAM.—The discharge of the defendant under the act, clearly did not enure to release him from liability to indemnify his sureties against payments subsequently made by them under the bond.

Judgment for the plaintiff.

A discharge under an insolvent law is no bar to an action on an express covenant to pay rent brought to recover rent accruing subsequent to the insolvent's discharge: *Lansing v. Prendergast*, 9 Johns. 127.

If the endorser of a note pay it after

the maker has been discharged under the insolvent law, such discharge is no bar to a suit on the note brought by the endorser against the maker: *Frost v. Carter*, 1 Johnson's Cases, 73; *S. C. 2 Caines*, 311; *Paxton v. Haster*, 6 Balst. 410.

*592] *WILLIAM FORRESTER BRAMLEY, Appellant, JOSEPH CHESTERTON, Respondent. May 29.

Where a tenant holds over after the expiration of a notice to quit, the landlord is entitled to recover against him the reasonable damages and costs sustained by him in an action at the suit of a party to whom he had contracted to let the premises, but to whom the tenant's wrongful act had prevented him from delivering possession.

THIS was an action to recover the sum of 50*l.*, that is to say, 40*l.* damages sustained by the plaintiff in consequence of the defendant having neglected and refused to deliver up to the plaintiff, when thereunto lawfully required by him, the possession of a certain dwelling-house situate in Granby Street, in the parish of St. Margaret, in the borough of Leicester, of which dwelling-house the defendant had been the occupier as tenant to the plaintiff, and for the determination of which tenancy due notice had been given by the plaintiff to the defendant; and also 10*l.*, the value of two shop-windows, door, and shutters, with the fixings and appendages, unlawfully removed by the defendant from the above-mentioned dwelling-house.

The cause was tried before the judge of the said court, without a jury, upon the 22d of October, 1856.

The plaintiff proved that he was the landlord of the premises mentioned in the plaint, which in May, 1855, were in the occupation of the defendant as tenant from year to year, at the rent of 85*l.* a year.

Before the 24th of June, 1855, the plaintiff gave notice in writing to the defendant to quit the said premises on Christmas-day then next. After service of the notice to quit, and so soon as time had expired so

that the plaintiff could not give defendant fresh notice to quit at Lady Day, the defendant called upon the plaintiff, and refused to give up possession pursuant thereto, alleging, among other reasons, that his tenancy did not commence at Christmas, and that the notice was informal on other grounds. The defendant also *immediately [598 instructed his solicitor to write to the plaintiff; and, on the 27th of August, 1855, the following letter was accordingly sent:—

“Leicester, August 27th, 1855.

“Sir,—Mr. Chesterton has brought me a notice to quit sent or delivered by you, directing him to give up possession of the house he now occupies in Granby Street, in this town; on perusing which, and some other documents connected with the tenancy of those premises, it would seem that your notice is informal and invalid on several grounds.

“Thinking you might probably act under the supposition that the notice was good, and that he would leave the premises at the time stated in your notice, I am directed by Mr. Chesterton to acquaint you that he does not intend to give up the premises at that time, unless some satisfactory arrangement be previously made for putting an end to the tenancy. Yours, &c. “PAUL DUDLEY.”

The plaintiff at such interview informed the defendant that he the plaintiff had let the premises as from Christmas then next to Mr. Thomas Harcott, at an increased rent, and that therefore the defendant must go out. The defendant then requested the plaintiff to see if he could arrange with Mr. Harcott to forego his agreement, and he, the defendant, would pay the increased rent. Accordingly the plaintiff saw Mr. Harcott, who refused to give up his agreement, and informed the plaintiff that he should bring an action to enforce it if he were not duly let into possession; that he, Harcott, had given notice to quit his then shop; and that he could not recede from the bargain. This conversation was communicated by the plaintiff to the defendant, who said thereupon that he, the defendant, did not care, that he could not give up the premises.

*The defendant did accordingly refuse to quit the said premises pursuant to the said notice; whereupon the plaintiff entered [594 a plaint in the said Leicestershire county court, and thereupon a summons issued to the defendant; and, upon the said summons coming on to be heard upon the 19th of March, 1856, it was adjudged by the said court that the plaintiff recover of the said defendant the said premises, together with costs of suit: and it was ordered that the defendant should forthwith quit and deliver up possession of the said premises, and that, if necessary, a warrant should issue for that purpose; and it was further ordered that the defendant should pay to the clerk of the court, at his office, 7l. for the plaintiff's costs.

Before the said 19th of March, 1856, the plaintiff was served with a

writ in the Court of Exchequer at Westminster, at the suit of the said Thomas Harcott, of which writ the defendant had notice, and subsequently with a declaration for breach of the said agreement, wherein the said Thomas Harcott claimed of the plaintiff 100*l.* as damages.

The defendant, on or before the 24th of March, 1856, sent Mr. Herbert, as his agent, to the plaintiff, and offered to pay him 8*l.* 15*s.* in respect of rent and damages due to him the plaintiff, provided he the plaintiff would sign a receipt tendered by Herbert, and which purported to be in discharge of rent and all damages, but the plaintiff refused to do so, and said that he could not give a receipt for damages, because he did not know what he should have to pay in Harcott's action; but the plaintiff at that time received from Mr. Herbert the sum of 8*l.* 15*s.*, and signed the following receipt:—

“March 24th, 1856. Leicester.

“Received the sum of 8*l.* 15*s.*, less property-tax, for one quarter's rent due 25th March, 1856. (Signed) “W. F. BRAMLEY.”

*595] *The plaintiff paid into court in Harcott's action the sum of 10*l.*, which Harcott took out of court, and went on with his action for damages *ultra*. After notice of trial was given for the Leicestershire Summer Assizes, 1856, the plaintiff settled the said action, by the payment of 8*l.* further as damages, and 13*l.* as the costs of Harcott's attorney; and the plaintiff also paid to his own attorney 6*l.* 12*s.* 6*d.* for his costs in the action,—making together the sum of 37*l.* 12*s.* 6*d.*

At the close of the plaintiff's case, the court determined that the plaintiff could not recover any damages in respect of the shop-windows, or any damage in respect of rent,—being a sum claimed by him amounting to the difference between the rent for a quarter as paid by the defendant, and the amount which would have been paid by Thomas Harcott. The question, therefore, was, could the plaintiff recover the said 37*l.* 12*s.* 6*d.* or any part thereof.

On the behalf of the plaintiff, it was urged that the plaintiff was entitled to recover the amount as special damages in trespass for meane profits; and the court was referred to *Tindall v. Bell*, 11 M. & W. 228,† and asked to find as a fact that the plaintiff had done what a reasonable man could be required to do to settle the suit, and that the sum so paid was the necessary consequence of the defendant's wrongful holding over, and that, at all events, the plaintiff was entitled to pay money into court and costs up to that time, and that the plaintiff had done what a prudent man would have done in settling the suit.

On behalf of the defendant, it was argued, that the claim for damages alleged to be consequential on his holding over, was not sustainable, as the plaintiff might have sued the defendant for double value, under the statute 4 G. 2, c. 28; and that the acceptance of rent, received qua

rent, up to the 25th day of March, was a *waiver of the plaintiff's right to claim double value, or to claim damages in the nature of mesne profits on the ground that the defendant was a trespasser after Christmas, 1855; and that the receipt of such last-mentioned rent was an acknowledgment that the defendant was lawfully in possession up to that time: and the case of *Doe d. Cheny v. Batten*, Cowp. 243, was referred to. [*596]

On behalf of the defendant, it was also contended that the damages were too remote, and that the money which the plaintiff had been compelled to pay to a third person, under a contract to which the defendant was no party, was not the necessary damage resulting from the defendant's holding over.

On behalf of the defendant it was also contended, that, as an action for double value would not lie in a case where the defendant held over under a *bonâ fide* claim of right,—*Wright v. Smith*, 5 Esp. N. P. C. 203,—so, as the defendant held over here under such a claim, this action was not sustainable; and that the plaintiff had no right to let the premises under the circumstances.

On behalf of the plaintiff, it was urged in reply that the right to bring an action for double rent under the statute referred to was a cumulative remedy, and did not deprive the plaintiff of his right to recover the damages claimed as special damage in this action; that the acceptance of the rent under the circumstances was no waiver; nor was the money paid or accepted in satisfaction of damages; nor was such acceptance any admission of the defendants being rightfully in possession,—upon which point the prior judgment of the court, was conclusive *inter partes*.

It was further argued for the plaintiff that the damage was not too remote; that the defendant had all along known that *Harcott* would bring an action *on his agreement; that the damages were the necessary consequences of the defendant's wilfully holding over; and that, as the defendant wilfully held over, *bona fides* had no influence upon the determination of the rights of the parties. [*597]

The judge directed a verdict to be entered for the plaintiff for 37l. 12s. 6d.; and he found as a fact that the plaintiff had done what a reasonable man would have done in settling the action with *Harcott* upon the terms above mentioned; and that the costs did not exceed what would have been incurred in the paying of the money into court; and that, as a matter of fact, the plaintiff did not accept the said sum of 8l. 15s. in satisfaction of the damages herein, or waive thereby his claim thereto, unless as a matter of law his acceptance of such money, and his giving such receipt, deprived him of his right to bring any action for damages under the circumstances disclosed upon this case.

The question for the opinion of the court was,—first, whether the acceptance of such money, and the giving of such receipt, in point of

law, deprived the plaintiff of his right to damages in this action,—secondly, whether the damages sought to be recovered were too remote.

Phipson, for the appellant.—It may be conceded that the mere receipt of rent did not in point of law deprive the plaintiff of his right of action for any legal damage he might have sustained. But the question is what is the true measure of damages sustained by the plaintiff from the defendant's wrongful act in holding over after the expiration of the notice to quit. The real damage, it is submitted, is, the difference between the rent which the defendant contracted to pay and the increased rent. In *Fletcher v. Tayleur*, 17 C. B. 21 (R. C. L. R. vol. 84), *Jervis, C. J.*, and *Willes, J.*, professing to found themselves *598] upon the rule *laid down by the Court of Exchequer in *Hadley v. Baxendale*, 9 Exch. 841,† suggest that the damages in an action for the breach of a mercantile contract should be estimated according to the average per centage of mercantile profits. *Hadley v. Baxendale* was an action against a carrier for unreasonable delay in the conveyance of a shaft for a mill, whereby the mill was prevented from working: and *Alderson, B.*, in delivering the judgment of the court says: “We think the proper rule in such a case as the present is this:—Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.”(a) In *Robinson v. Harman*, 1 Exch. 850, 855,† *Parke, B.*, says,—“The rule of the common law is, that, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.” [WILLIAMS, J.—Suppose the mesne landlord were called upon to pay double value, could he recover that as damages against his tenant?] Possibly that might be a damage naturally resulting from the wrongful act of the under-tenant. [WILLIAMS, J.—I find in *Chitty on Pleading*, Vol. II. p. 342, a precedent of a declaration in an action of that sort.] In *Maine on Damages*, pp. 15, 16, it is said,—“One very common instance in which damages are *599] held to be too remote, *arises where the plaintiff claims compensation for the profits which he would have made if the defendant had carried out his contract. It is by no means true, however, that such profits can never form a ground of damage. There are many cases in which the profit to be made by the bargain is the only thing purchased, and in such cases the amount of that profit is strictly the measure of damages. Where A. agrees to execute work for B., or to

(a) See the remarks upon these cases in *Maine on Damages*, page 2.

sell him goods, or hire him a ship at a future day, the benefit to A. is the profit flowing from the transaction, and to this he is entitled. But, when the thing purchased is a specific article, and not the right to make a profit, the measure of damages will be the value of that article, or the difference between the contract price and that at which it could have been purchased elsewhere. The mere fact that some ulterior profit might have been made out of it cannot be considered, because such profit formed no part of the contract. This distinction has been very clearly pointed out in a case in the Supreme Court of New York, *Masterton v. The Mayor of Brooklyn*, 7 Hill (American), 61. The plaintiffs had contracted with the defendants to furnish marble from a specified quarry, at a fixed sum, for the erection of a city hall. The plaintiffs entered into a contract with the proprietors of the quarry for the required amount, at a smaller sum. After delivering a part of the marble, the defendants refused to receive any more. The plaintiffs sued for breach of contract, and claimed as damages the profit they would have made by furnishing the marble at a larger sum than they were to pay for it. Kent, J., ruled accordingly 'that the jury should allow the plaintiffs as much as the performance of the contract would have benefited them;' and this ruling was affirmed in the court above. Nelson, C. J., said: 'It is not to be denied that there are profits or gains derivable from a contract which are *uniformly rejected as [*600 too contingent and speculative in their nature, and too dependent upon the fluctuation of markets and the chances of business, to enter into a safe or reasonable estimate of damage. Thus, any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration not to be taken into the estimate. Besides the uncertain and contingent issue of such an operation, in itself considered, it has no legal or necessary connexion with the stipulation between the parties, and cannot therefore be presumed to have entered into their consideration at the time of contracting. When the books and cases speak of the profits anticipated from a good bargain, as too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself,—entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed perhaps the only inducement to the arrangement.'" The damages

here claimed clearly do not fall within that principle: and it is impossible not to foresee the inconvenience and the difficulty that will result from a departure from the broad rule which these authorities lay down. [WILLES, J.—I am by no means satisfied that this is an action *601] for breach of contract.] It is submitted that this is *substantially an action for the breach of the implied contract on the part of the tenant to deliver up possession of the premises at the expiration of his tenancy. The rule is laid down in Sedgwick on Damages, pp. 66 et seq. and pp. 210 et seq., in terms similar to those in Maine, and several authorities cited, the general result of which is, that “the damage to be recovered must always be the *natural and proximate* consequence of the act complained of:” and this rule is equally applicable to actions of tort as to actions upon contract. “Substantial damages will be given for the detention of an article which has fallen in value between the time it was taken and the time it was returned:” Maine, p. 217, citing *Williams v. Archer*, 2 C. & K. 26 (E. C. L. R. vol. 61), 5 C. B. 318 (E. C. L. R. vol. 57). “The action was detinue for railway scrip which was delivered up under an order in the above terms. The plaintiff proceeded to trial, and proved that, at the time of demand, the scrip were worth 3*l.* 5*s.* each, but only 1*l.* at the time of the delivery. The judge directed the jury that the true measure of damage was the loss the plaintiff sustained by not having the shares when demanded; and that they might, if they pleased, measure that loss by the difference between the price at the time of the refusal and the price at the time when the certificates were given up; and they found accordingly. This direction was held to be correct, on a writ of error.” *Pounsett v. Fuller*, 17 C. B. 660 (E. C. L. R. vol. 84), further illustrates this principle.

Mundell, for the respondent.—This is not a plaint in contract, but strictly in tort: *Doe d. Cheny v. Batten*, Cowp. 243; *Goodtitle v. North*, 2 Dougl. 583; *Dunn v. Large*, 3 Dougl. 335. The tenant is a wrongdoer in holding over after the expiration of notice: from the time the landlord's title accrues, he is a trespasser. [COCKBURN, C. J.—*602] Was this man a trespasser during the *time of the occupation in respect of which you accepted rent from him? It is expressly found in the case that there has been no waiver; and it appears from the statements therein that the appellant had been previously ejected. *Draper v. Crofts*, 15 M. & W. 166,† shows that this is not an action for breach of contract. It was there held, that, where there is a demise to A. and B. for a term, and B. holds over after the expiration of the term, without A.'s assent, A. is not liable for rent becoming due during such holding over. And *Hanslip v. Padwick*, 5 Exch. 615,† is an authority to show, that, even if this were a case of contract, the damages in question would be recoverable. The argument on the other side, if well founded, would prevent all dealing with an estate in reversion.

The defendant must have contemplated at the time of entering into the contract of tenancy, that the landlord would let the premises to a new tenant before the expiration of his term: and the case finds that he did in fact know that the premises had been let to Harcott, and that Harcott threatened an action if he did not obtain possession. Professor Sedgwick, in treating of the measure of damages in an action for mesne profits, says,—2d edit. p. 128,—“It is plain that the measure of compensation which we are now considering, has been involved in confusion by the technical character of our forms of action. ‘The dicta on the subject,’ says Gibson, C. J., in *Pennsylvania*, ‘seem to have been predicated by judges who had no precise idea of it, for they have not defined it by any landmarks.’ (a) The action of trespass, being one of tort, admits of any evidence in aggravation, and therefore, in one sense, it is correct to say that the damages in this proceeding are entirely at large and under the control of the jury. But, on the other hand, [*603 there is nothing necessarily in the action in the nature of a trespass. The property may have been withheld and the rents received in entire good faith. In this case the allegations of force, &c., are purely fictitious, and it certainly never would be tolerated on such facts that the jury should give any damages beyond the actual value of the income. It may then be said, as long as the technical form of action is maintained, that, where circumstances of malicious aggravation are proved, such, for instance, as a wilful holding for the purpose of oppression, the jury may give vindictive or exemplary damages, but that, where no such facts are shown, they are limited to the actual annual value of the property, with interest thereon, and the costs of the ejectment suit.” This is an exceptional case. [COCKBURN, C. J.—Do you contend, that, if the landlord had let the premises to the new tenant for the purposes of a manufactory, and the latter had purchased expensive machinery which in consequence of his inability to obtain possession had become useless to him, and he had thereupon brought an action against the landlord for the breach of contract, and recovered large damages against him, the tenant holding over would be liable to recoup him?] It certainly would be difficult to urge the argument to that extent. [COCKBURN, C. J.—If so, where is the line to be drawn?] The rule laid down in Sedgwick for the action for mesne profits seems to be the reasonable one. One of two persons must suffer. Is it to be the man who has dealt legally and properly with his property, or he who has been guilty of the wrong?

Phipson, in reply.—There is no reason for holding this to be an exceptional case. In *Tindall v. Bell*, 11 M. & W. 228,† which was an action for running down a ship, it appeared that the plaintiff had been obliged, *in consequence of the injury, to employ a steam-tug, [*604 the owners of which demanded 150*l.* for salvage, and commenced

(a) *Alexander v. Herr*, 11 Penn. Rep. (American), 537.

a suit in the Admiralty Court against the plaintiff, who paid 20*l.* into court, and that the Admiralty Court ultimately decreed 45*l.* to the salvors: and it was held, upon these facts, that the plaintiff was not entitled to recover the amount of the costs incurred by him in that suit. [WILLES, J., referred to *Short v. Kalloway*, 11 Ad. & E. 28 (E. C. L. R. vol. 39), where Lord Denman says that "no person has a right to inflame his own account against another, by incurring additional expense in the unrighteous resistance to an action which he cannot defend."] This subject underwent considerable discussion, and all the modern authorities are collected, in *Smith v. Howell*, 6 Exch. 730.† In *Harding v. Crethorn*, 1 Esp. N. P. C. 57, upon a tenant holding over, the extent of his liability was assumed to be the rent.

COCKBURN, C. J.—I am of opinion that the decision of the judge of the county court was right, and that his judgment must be affirmed. I am far from saying that a landlord would be entitled to recover any special damage that might result from his inability to fulfil the contract he has entered into, in consequence of his tenant wrongfully holding over after the expiration of his term either by effluxion of time or by a legal notice to quit, where he has re-let the premises for any special and extraordinary purpose. But here the landlord claims no more than what he has been called upon to pay in the shape of damages for being deprived of the ordinary use of the land. Having let the premises, he was prevented from fulfilling his contract with the new tenant by the wrongful act of the defendant in refusing to go out when his term expired; and for that breach of contract, so occasioned by the defendant's wrongful act, the plaintiff has been compelled to pay damages to the party with whom he contracted. This use of the land by the landlord, viz., the letting it to a new tenant, is the common and ordinary course of dealing on the part of an owner of land. The defendant, therefore, must have understood, that, when the plaintiff gave him notice to quit, he would enter into a contract with a new tenant to let the premises to him from the expiration of such notice. And in this case there is the further and not unimportant fact that the tenant was apprised of the fact that the landlord had re-let the premises, and consequently was aware of the inconvenience and loss he was exposing him to by his improper conduct. I therefore think it not at all unreasonable, but, on the contrary, very salutary, to hold him liable to compensate his landlord to the extent of the natural and necessary consequences of his wrongful act.

CRESSWELL, J.—I am of the same opinion. I think this may fairly be treated as an action for the wrong. The defendant had notice to quit: he was therefore guilty of a wrong in holding over after the expiration of his tenancy. I do not say that the defendant could be held responsible for extraordinary damages accruing from any peculiarity in the contract into which the plaintiff might have entered with the new

tenant; but only for any ordinary claim which could be made upon him for not giving up possession pursuant to his contract. As far as that goes, it seems to me that the decision of the county court judge was right.

WILLIAMS, J.—I am of the same opinion. So far as regards the assessment of damages, I think this may very well be treated as an action for mesne profits. All that the plaintiff seeks to recover, is, the damages he has sustained from the act of the defendant. I by [*606] no means intend to express an opinion that these damages would not have been recoverable if this were to be considered as an action of contract.

WILLES, J.—I am of the same opinion. I would wish, however, to guard myself from admitting that, apart from contract, the tenant is liable for holding over. But, assuming this to be in the nature of an action of trespass, the costs and damages here claimed are nothing more than those which naturally resulted from the defendant's wrongful act. It is not suggested that the damages paid to Harcott were paid to him as compensation for the loss of a good bargain. I therefore concur in the judgment pronounced by my Lord and the rest of the court.

Appeal dismissed, with costs.

PATTEN v. REA. May 25.

A master is responsible for an injury occasioned by the negligent driving of his servant, where he is acting at the time in his service and in a manner impliedly sanctioned by him.

A., the general manager of the defendant, the proprietor of a horse repository, was possessed of a horse and gig, which were kept for him upon the defendant's premises free of charge, and were used by A. in the conduct of the defendant's business. In going (with the knowledge of the defendant) upon the defendant's business, with the horse and gig, A. drove against and killed the plaintiff's horse:—Held, that the defendant was responsible; and that it was immaterial that A. was *also* going on private business of his own.

THIS was an action against the defendant for negligence in driving a horse and gig. The declaration stated that, by the wrongful act, neglect, and default of one William Taylor, then being and acting therein as the servant of the defendant, a certain horse and carriage of the defendant were driven upon and against a horse of the plaintiff, which last-mentioned horse was thereby killed.

*The defendant pleaded,—first, not guilty, —secondly, that [*607] the horse and carriage in the declaration mentioned were not the property of the defendant as alleged,—thirdly, that the horse and carriage in the declaration mentioned were not under the care, management, and direction of the defendant as alleged. Issue thereon.

The cause was tried before Crowder, J., at the first sitting at Westminster in Hilary Term last. The facts which appeared in evidence

were as follows:—The plaintiff was the proprietor of a repository for the sale of horses, at Newington, in the county of Surrey. Taylor was his manager there, acting as auctioneer in the sale of horses, collection of moneys, and otherwise in the general conduct of the business. He had a horse and gig, his own property, which were kept for him on the premises of the defendant free of charge, and which he was in the habit of using when going out upon the defendant's business. One Smith had bought a horse at the defendant's repository, which he ought to have paid for at the office upon the premises, but had not done so. On the 10th of November, 1856, Taylor was going in the gig to see his medical attendant at Finsbury Place, and also purposed to call upon Smith for payment of the debt he owed the defendant for the horse; and, whilst on his way to the former place, and before he got to Smith's, he negligently ran against and killed a horse belonging to the plaintiff.

It appeared, that, whilst Taylor was getting ready the horse and gig for the purpose of going on the journey in question, the defendant asked him where he was going, when Taylor told him he was going to get Smith's money.

On the part of the plaintiff it was insisted, that, although the horse and gig were the property of Taylor, yet, as at the time of the *608] accident he was using it in the defendant's business, and with his knowledge, the defendant was liable. The contrary was contended on the part of the defendant.

In answer to questions put to them by the learned judge, the jury found, that, on the occasion in question, there was no verbal request by the defendant to Taylor to go with the horse and gig upon the defendant's business; but that Taylor went on the journey upon the business of the defendant, and that the defendant knew it and assented to it.

Upon this finding, the defendant's counsel claimed to have the verdict entered for him upon the second and third issues.

The learned judge, however, ruled that the plaintiff was entitled to the verdict upon all the issues, and the jury assessed the damages at 81l.

Atherton, in Hilary Term last, obtained a rule nisi for a new trial, on the ground of misdirection on the part of the learned judge,—first, in not leaving to the jury the question whether the horse and gig driven by William Taylor were used by him on his master's business, at the instance and *express* request of the defendant,—secondly, in not directing the verdict to be entered for the defendant, on the fact being found, and not disputed, that the horse and gig were the property of William Taylor, not by him made over or bailed to the defendant; or on the ground that the verdict was against the weight of evidence, if it was to be taken that the jury in fact found that the horse and gig

driven by Taylor were used by him on his master's business at the instance and *express* request of the defendant.

Montagu Chambers, Q. C., and *Joyce*, now showed cause.—The evidence shows beyond dispute that Taylor was at the time the collision took place acting in the *service and about the business of the defendant; and the fact of the horse and gig belonging to [609 Taylor can make no difference; the defendant would have been equally liable if they had been the property of a stranger. Taylor had the general management of the defendant's business. A horse had been sold to one Smith, and Taylor was going to him for the purpose of obtaining payment for it. He was also, it is true, going elsewhere, for a purpose of his own: but he met with the accident before he reached Smith's. [WILLIAMS, J.—Was it essential to the master's business that the journey should be made with the horse and gig?] Probably not: but Taylor was in the habit of going about his master's business with the horse and gig. [COCKBURN, C. J.—Suppose the master had said to him, "Go to such a place," without more, would he be liable?] That would depend upon the surrounding circumstances. Here, the evidence was, that Taylor's horse and gig were kept for him free of cost upon the defendant's premises, that he was in the habit of using them when going upon the defendant's business, and that, on the occasion in question, the defendant knew where he was going, and the manner of going. He therefore tacitly assented to his going in that manner. The case of *Goodman v. Kennell*, 1 M. & P. 241 (E. C. L. R. 17), is very much in point. There, a person occasionally employed by the defendant as his servant, being sent out by him on his business, took the horse of another person, in whose service he also worked, and, in going, rode over the plaintiff. At the trial, it was left to the jury to say whether or not the horse was taken by the servant with the *implied* consent or authority of the defendant; and, they having found a verdict for the plaintiff, the court refused to interfere. Best, C. J., said: "It has been truly said that a servant's riding the horse of another, without the assent or authority of his master, *can- [610 not render the latter answerable for his acts. But here the question was, whether there was not sufficient evidence to show that Cocking was riding the horse with the defendant's assent, and on his business. It was proved that Cocking was the servant of the defendant; that the horse was in his stable; and that on the day the accident happened, Cocking was going on the defendant's business or employment. The proof of these three facts was sufficient to raise a strong presumption that Cocking was using the horse with the defendant's consent." Here, the proper question was left to the jury,—did Taylor go in the gig at the request of the defendant, or with his assent? The jury found that it was done with the defendant's knowledge and assent. [CROWDER, J.—The contention was, that, in order to

render the defendant liable, there must be something tantamount to a command by the master. The rule is not quite correct in the use of the word *express*.] It might almost be said here that there ~~was~~ an express command. [The court called on

Atherton, Q. C., and *Barnard*, to support the rule.—This is an action against the defendant, not for an act or omission imputed to him personally, but for an act done by his servant. That Taylor was at the time of the accident acting in the service of the defendant, and about his business, is admitted. That, however, is not enough to impose upon him this liability. The rule of law is well exemplified by the language of the declaration itself: to render the defendant liable, Taylor must in the very act of driving have been acting as his servant, and not upon his own account. A man may be the servant of another at the time of doing the act which causes the injury, without that other being responsible for the mode of doing the act. The question is, not *611] whether the servant was engaged on his master's business, but whether he was going in the particular manner,—with the horse and chaise,—as his servant. The mere fact of the master seeing him about to start in the chaise, and making no objection, is not enough. [COCKBURN, C. J.—That is only one circumstance. The facts seem to be these:—Taylor is employed in the general management of the defendant's business. He possesses a horse and gig; and it is mutually agreed, that, in consideration of the use of the horse and gig by Taylor for the purpose of the defendant's business, they shall be kept upon the defendant's premises without charge. Upon the occasion in question, Taylor was going out upon his master's business; the master saw him start upon the journey, and thereby assented to that mode of performing the service. The knowledge of the master was only one circumstance, in addition to the other and more material ones. I think it was a question for the jury, and that there was abundant evidence for them.] There was no evidence of any agreement or arrangement to the effect just stated. There was no bargain that the use of the horse and gig for the purposes of the defendant's business should be an equivalent for the horse's keep. [COCKBURN, C. J.—It was a tacit arrangement. That seems to have been assumed on all hands.] Suppose a master desires his servant to go to a certain place, and the servant of his own accord borrows a friend's horse for the purpose of riding there, and his master meets him by accident on the way, and says nothing,—could it be contended, that, in riding that horse, the man was acting in the service of his master, so as to make him responsible for any misadventure of the servant on the road? [CROWDER, J.—You must not lose sight of the other facts. Taylor was manager at the defendant's establishment; and his horse and gig were kept there without charge, and were used by him from time to

time upon his *master's business.] There was no evidence of any contract which made it his duty to use the horse and chaise in his master's service. It clearly was a misdirection not to leave it to the jury to say whether the horse and gig were used by Taylor on his master's business, at the instance and request, express or implied, of the defendant. [COCKBURN, C. J.—I think the master would have been liable if Taylor had taken the horse and chaise without his knowledge. I think there was abundant evidence for the jury, independently of that fact.] To justify the verdict, it should have been found as a fact that there was some obligation, some binding contract, on the part of Taylor to find a horse and gig for the service of his master.

COCKBURN, C. J.—I am clearly of opinion that this rule must be discharged. I concur in the argument urged by the defendant's counsel, to this extent, that, to render the master liable, it is not enough to show that the person driving the vehicle which causes the damage is his servant, but that it must be shown that the servant was driving with his master's authority and upon his business. Now, I think there was abundant evidence here that Taylor was driving, at the time the accident occurred, with the defendant's authority and in the course of business as his servant. Taylor, it appears, was the general manager of the defendant's establishment; and, being so, he, either by express agreement or by some tacit arrangement, was in the habit of using in transacting the defendant's business a horse and gig, his own property, which, in consideration of that arrangement, were kept for him upon the defendant's premises free of charge. Looking at these circumstances, and considering the nature of the business, I think Taylor must be assumed to have had authority to exercise his *discretion as to the mode of performing his duty to his master. Adding to this the fact that the master knew that his servant was using the horse and gig on the particular occasion, I think the evidence was ample to show that what was done had the sanction and authority of the master. That question was not at all withdrawn from the jury. The contention on the part of the defendant at the trial was, that he was not responsible for the damage, because the horse and gig were the property of Taylor, and because there was no evidence of any *express* command from the defendant to Taylor to use the horse and gig upon the occasion in question. I think the former part of the argument is met by the fact that the horse and gig were kept by the defendant free of charge to Taylor, and were ordinarily used by him in the performance of journeys about his master's business, and the latter by the fact that the master was cognisant of the course which his servant was pursuing at the time, and did not dissent. I think the case was properly presented to the jury, and that there is no ground for saying that the verdict was not well warranted by the evidence.

WILLIAMS, J.—I am entirely of the same opinion. I agree with Mr. *Atherton*, that, in cases of this sort, the real question is, whether the servant while doing the negligent act complained of was acting as the agent of the defendant. That is demonstrated by the consideration that the plaintiff in declaring in such an action has the option of alleging the negligent act to be the act of the servant, or of relying upon the legal effect, and alleging it to be the act of the master. Thus, in *Brucker v. Fromont*, 6 T. R. 659, it was held that a declaration which charges the defendant with having negligently driven his cart against the plaintiff's horse, is supported by evidence that *the defendant's servant* *drove the cart. I think there was ample evidence here that Taylor, at the time of the accident, was acting as the servant and by the authority of the defendant. It was incumbent on the plaintiff, no doubt, to show that Taylor acted as the defendant's agent in the employment of the horse and gig upon the particular occasion. I think there was evidence enough of that for the jury, and that that question was properly left to them. The rule does not complain that it was not so left: the complaint is, that my Brother Crowder misdirected the jury in not leaving to them the question whether the horse and gig driven by Taylor were used by him on his master's business, *at the instance and express request of the defendant*. Now, it clearly is not necessary in cases of this sort that there should be any *express* request: the jury may imply a request or assent from the general nature of the servant's duty and employment. There was ample evidence of such implied request or assent here. The only other complaint made of the direction was not relied on by Mr. *Atherton* in his argument in support of the rule: nor could it have been with any hope of success. Upon neither ground, therefore, can this rule be sustained.

WILLES, J.—I am clearly of the same opinion. The argument urged on the part of the defendant amounts in substance to a denial of the general rule laid down by Lord Holt in *Turberville v. Stampe*, 1 Lord Raym. 266, (a) that "a master is responsible for all acts done by his servant in the course of his employment, though without particular directions." Was Taylor at the time the accident complained of happened acting in the *course of his employment? It appears that part of the terms of his employment, was, that he should have the benefit of the keep of his horse and the standing of his gig upon his master's premises, in consideration of his using them when going about his master's business; and that he was actually engaged on his master's business, viz. going to collect a debt due to him, at the time. And it further appears that his master knew that he was going, and in what manner he was going. The master is clearly responsible.

(a) Carth. 425, Com. 32, Salk. 13, Skinn. 681, 12 Mod. 151, Holt, 9, Comb. 459, 1 Vin. Ab. 316, pl. 9, 2 Vin. Abr. 400, pl. 15, 15 Vin. Abr. 311, pl. 9.

CROWDER, J., said nothing.

Rule discharged.(a)

(a) See *Mitchell v. Crassweller*, 13 C. B. 237 (E. C. L. R. vol. 76).

Where an employee is exercising a distinct and independent employment, and is not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the negligence or carelessness of the employee. Thus, where a public licensed drayman was employed to haul a quantity of salt from a warehouse and deliver it at the store of the employer at so much per barrel, and while in the act of delivering the salt, one of the barrels, through the carelessness of the drayman, rolled against and injured a person passing on the sidewalk, it was held that the employer was not liable for the injury: *De Forrest v. Wright*, 2 Michigan, 368.

For cases on the general doctrine, see *Foster v. Essex Bank*, 17 Mass. 479; *Deerfield v. Delano*, 1 Pick. 465; *Kern v. Piper*, 4 Watts, 222; *Brown v. Purviance*, 2 Har. & Gill. 816; *Wilson v. Peverly*, 2 N. Hamp. 548; *Puryear v. Thompson*, 5 Humph. 397; *Harris v. Mabry*, 1 Iredell, 240; *Campbell v. Stairt*, 2 Murph. 389; *Shaw v. Reed*, 9 Watts & Serg. 72; *Armstrong v. Cooley*, 5 Gilman, 509; *Philadelphia and Reading Railroad Co. v. Derby*, 14 Howard, S. C. 468; *Southwick v. Estes*, 7 Cush. 385; *Priester v. Angley*, 5 Rich. 44; *M'Clenaghan v. Brock*, Id. 17; *Moon v. Sanborne*, 2 Mich. 519.

JONES v. MARSHALL. May 25.

An attorney, not engaged for either of the parties in a cause, but merely attending as the professional adviser of bail put in in the Lord Mayor's Court for the purpose of dissolving an attachment, is not privileged from arrest upon a ca. sa. while going to or returning from the registrar's office for that purpose.

H. J. HODGSON, on a former day in this term, obtained a rule calling upon the plaintiff to show cause why the defendant, an attorney of this court, should not be discharged out of custody as to his arrest under the writ of ca. sa. issued in this cause,—on the ground that he was at the time privileged from arrest.

The affidavit upon which the rule was obtained stated that the defendant was a certificated attorney of this court, and also on the roll of the Lord Mayor's Court, London; that, on the 14th of May, 1857, he accompanied two other persons named Hawke and Mumbray (who joined in the affidavit) to the chief office of the Lord Mayor's Court, in Old Jewry, in the city of London, and also to the registrar's office of that court, in Guildhall Chambers, Basinghall Street, and that he did, on that day, in pursuance of instructions from those persons, and at their request, as their attorney, attend at the said offices upon the occasion of their being then put in as bail for a defendant for the purpose of dissolving an attachment in and connected with an action then and still pending in that court; that it was his duty, in pursuance of the said instructions, to attend during the putting in of

the said bail, on behalf of his said clients; and that he did so attend at the said offices, and not for any other purpose, or on any other business; that, after the said Hawke and Mumbray had been put in as bail as aforesaid, he left the said registrar's office, and, whilst directly proceeding on his return to his place of residence, and before passing through the gateway of the said Guildhall Chambers, he was arrested under a ca. sa. at the suit of the plaintiff.

Honyman showed cause.—There is no pretence for saying that this person was privileged from arrest. It does not appear that he was attending as the attorney of either of the parties to the suit in the Lord Mayor's Court; and, as attorney for the bail, he could not have been heard. Even counsel engaged in the cause are not allowed to interpose on behalf of a witness who claims privilege: *Thomas v. Newton*, M. & M. 48, n. (E. C. L. R. vol. 22). This sort of privilege was very much discussed in *Newton v. Constable*, 2 Q. B. 157 (E. C. L. R. vol. 42), where Lord Denman, in delivering the judgment of the court, says: "The attendance of parties and of witnesses has been always protected. It is absolutely necessary for the ends of justice that their attendance should be privileged, because without it justice cannot be administered. But the protection of legal officers is of a different character, and may well be confined within narrower limits. That
*617] of barristers attending the superior courts is explained in the case of *Collier v. Hicks*, 2 B. & Ald. 663, 672, as depending on prescription. The extent of it is not very clearly defined. When they have been actually engaged in the business of the court, they are certainly privileged: how far this might be the case when the attendance was merely in the exercise of their profession, afforded for the benefit of such suitors as might choose to engage them, but without actual engagement, no reported case has decided. There are traditions in Westminster Hall to which reference is made in *Meekins v. Smith*, 1 H. Bl. 636. But this privilege, to whatever extent allowed before the year 1833, may be traced to the recognised position and duties of the bar in Westminster Hall and on the circuits, where the same bar practise under the judges of the land. In that year, a barrister who had been arrested on his return from sessions, was discharged on motion by the Court of Exchequer: *Luntly v. Nathaniel*, 1 C. & M. 579,† 2 Dowl. P. C. 51. But on that case it is to be observed that the privilege was admitted at the bar without any discussion, the issue raised on the affidavits being, whether the defendant, at the time of arrest, was actually on his way home from the sessions: and further, that it was decided on the authority of *Meekins v. Smith*, above mentioned. Now, that case decides no such point. It only refused the privilege to a person who went to Westminster Hall to justify as bail, and was arrested on his return; the court saying it did not apply to all engaged in a cause. The judges stated their recollection of former discharges of barristers,

but with the qualification before adverted to." [WILLES, J.—The precedents for writs of privilege in Rastell, title "*Privilege*," seem to be confined to the attorney for the plaintiff and defendant in the suit.] In *Phillips v. Pound*, 7 Exch. 881,† where it *was held that an attorney's clerk is not privileged from arrest whilst going to a judge's chambers for the purpose of there conducting the attorney's business,—it was contended, upon the authority of *Meekins v. Smith*, "that all persons who *have relation to a cause* which calls for their attendance in court, and who attend in the course of that business, though not compelled by process so to do, are privileged from arrest, provided their attendance be not for any unfair purpose." But that doctrine was repudiated by the court.

Hodgson, in support of his rule.—It may at once be conceded that there is no direct authority to be found in the books upon this subject, but there are many analogous cases. Bail attending to justify, were held entitled to protection from arrest, in *Rimmer v. Green*, 1 M. & Selw. 638. [CRESSWELL, J.—Is the personal attendance of the bail necessary in the Lord Mayor's Court?] It is: they are required to sign a book. In *Archbold's Practice*, 9th edit., by Prentice, 719, it is laid down that "every person connected with a cause, and attending in the course of it, whether compelled to attend by process or not, such as parties, witnesses, bail, *attorneys*, &c., are privileged from arrest whilst going to, attending, and returning from court or a judge at chambers. So, an attorney is privileged from arrest whilst in attendance at the Master's office taxing costs, as well as going to and returning therefrom: *Re Hope*, 9 Jurist, 856." [COCKBURN, C. J.—The attorney there means the attorney of a party to the suit. An attorney for bail is not recognised. He can only attend for the purpose of giving private advice to his client. Suppose a witness were to take an attorney with him into court for the purpose of advising him as to whether or not he shall produce certain deeds,—would the attorney be protected from arrest *eundo*, **morando*, *et redeundo*?] The presiding judge in that case is the adviser of the witness: he needs no other. The statute 1 & 2 Vict. c. 110, s. 9, requires the attendance of an attorney to attest the execution of a warrant of attorney: that clearly is a case in which the privilege would be allowed. *Gascoyne's Case*, 14 Ves. 183, carries the privilege of the attorney a great way. And see *Moore v. Booth*, 3 Ves. 350. In *Bro. Privilege*, 1, and *Com. Dig. Privilege*, (A. 1), the protection is extended to "a servant or farmer who brings money to his master or lessor (plaintiff or defendant) for the suit." [COCKBURN, C. J.—What possible relation could this person have to the suit in the Lord Mayor's Court?] In *Newton v. Harland*, 8 Scott, 70, a barrister attending the court to hear judgment pronounced in a cause in which he was concerned, was held entitled to privilege.

COCKBURN, C. J.—I am of opinion that this rule should be discharged. It is essential to the administration of justice that the parties and their attorneys and witnesses, and all other persons representing the parties to the suit, should be protected from arrest on their way to the court, whilst remaining there, and returning from the court. But no precedent has been cited to show that that principle has ever been extended to an attorney acting on behalf of some one collaterally and incidentally brought into the suit: and I think it would be attended with dangerous consequences, and would be extending the rule much further than there is any warrant for, if we were to allow the privilege claimed here.

CRESSWELL, J., and CROWDER, J., concurred.

*620] WILLES, J.—I am of the same opinion. The passage *cited from Brooke's Abridgment has nothing to do with the privilege of an attorney. It means no more than this,—that a person attending in court for another who is a suitor there, has the same privilege as the person on whose behalf he attends. That passage is as follows:—"Nota que ou cestui que use vient a Westminster pur maintenir le suit de son feoffee que use, et il est arrest, il avera son privilege; et eadem lex de servant ou fermor que vient pur porter money a son lessor que est en suite, pur maintenir le suit; et si home vient pur suer original, et est arrest devant que il poit suer ceo, il sera examyne et avera le privilege, coment que nul ple soyt pendant." 27 H. 8, fo. 20. How that may be at the present day, it is unnecessary to say.

Rule discharged.

SIMONS v. THE GREAT WESTERN RAILWAY COMPANY. May 25.

A declaration against a railway company, for damage to goods intrusted to them to carry, alleged that the goods were delivered to the defendants as *common carriers*, and that they received them as such common carriers. Plea, that the goods were received by the defendants to be carried subject to a special contract whereby they were declared not to be answerable for any loss or damage, however caused. In support of the plea, the defendants produced a paper, signed by the plaintiff, acknowledging that the goods were to be carried subject to certain conditions, one of which was, that the company were not to be responsible for any loss or damage, however caused, &c. On the part of the plaintiff, it was proved, that, when asked by a clerk of the defendants at the time the goods were delivered at the company's warehouse to sign the paper, the plaintiff expressed his unwillingness to do so, inasmuch as he could not see to read it, whereupon the clerk said that it was of no consequence, and that the signature was a mere matter of form; and that the plaintiff, relying upon that assurance, signed the paper.—Held, that, upon this evidence, the jury were warranted in finding that the goods were not delivered to the company to be carried under the special contract.

THIS was an action against the Great Western Railway Company for the loss of certain goods intrusted to them to carry.

The declaration stated, that the plaintiff, on, &c., *delivered to the defendants as common carriers, and the defendants, as such carriers,*

received divers, to wit, 150 *packages of furniture, goods, chattels, and effects of the plaintiff, to be safely and securely carried [*621 and conveyed for the plaintiff by the defendants, to wit, from Paddington, in the county of Middlesex, to Taunton, in the county of Somerset, there to be safely delivered to the plaintiff for certain reward therefor then paid by the plaintiff to the defendants: yet the defendants so carelessly and negligently conducted themselves in and about the carrying and conveying of the said goods, that, by and through the carelessness, neglect, and default of the defendants, divers, to wit, 10 of the said packages, and the contents thereof, were wholly lost to the plaintiff, and the residue of the said packages, and the furniture, goods, chattels, and effects therein contained, were by the like carelessness, neglect, and default of the defendants in the carriage and conveyance thereof, greatly broken, damaged, and destroyed.

The defendants pleaded,—first, not guilty,—secondly, that the plaintiff did not deliver nor did the defendants receive the goods to be carried as in the declaration alleged,—thirdly, that the defendants received the goods to be carried subject to a special contract that they should not be answerable for the loss of or damage to the goods if insufficiently or improperly packed, and that the goods were insufficiently and improperly packed,—fourthly, that the said furniture, goods, chattels, and effects in the declaration mentioned, were received by the defendants from the plaintiff to be carried and conveyed by the defendants for the plaintiff from Paddington to Taunton as aforesaid, at a certain special mileage rate, and under and subject to a certain contract made between the plaintiff and the defendants, and *signed by the plaintiff*, whereby it was agreed that the said furniture, goods, chattels, and effects, being so received as in this plea mentioned, the *defendants should [*622 not be answerable for any loss or damage, however caused, of or to the said furniture, goods, chattels, and effects, while the same were being carried and conveyed by the defendants for the plaintiff; and that the loss and damage in the declaration mentioned occurred and was caused while the said furniture, goods, chattels, and effects were being carried and conveyed by the defendants for the plaintiff.

The plaintiff took issue on all the defendants' pleas: and, for a second replication to the third and fourth pleas respectively, said, that the said contracts in those pleas mentioned were respectively contained in a certain paper or document, partly printed and partly in writing, purporting on the face thereof to specify the packages of the said furniture and goods received by the defendants as in the declaration mentioned, and the charges to be paid on the delivery thereof; on the back of which said document was printed a certain notice, conditions, or declaration, limiting the liability of the defendants for loss or injury to the said goods in the receiving, forwarding, or delivery thereof occasioned by the neglect or default of the defendants, and

which said paper or document was in the words and figures following, and not further or otherwise. The replication then set out the form of receipt, and the conditions of carriage, the 15th of which was as follows:—"Goods conveyed at special or mileage rate must be loaded and unloaded by the owners or their agents; and the company will not be responsible for any risk of stowage, loss, or damage, *however caused*, nor for discrepancy in the delivery, as to either quantity, number, or weight, nor for the condition of articles so carried, nor for detention or delay in the conveying or delivery of them, *however caused*."

The cause was tried before Crowder, J., at the sittings in London *623] after the last term. The facts were as *follows:—The plaintiff, having certain packages of furniture to send from London to Taunton, in October, 1854, went to the office of the Great Western Railway Company at Paddington to inquire the terms upon which they would be carried. Being told the terms, he again went to the office with the goods on the 8th of November, and, after they were loaded into the company's trucks, he paid the sum demanded, viz. 7l. 16s. After the plaintiff had paid the money, a clerk of the company produced a paper, and asked the plaintiff to sign it. The plaintiff told the clerk that he had not his spectacles with him, and that he very much objected to sign a paper which he could not read. The clerk said it was of no consequence, and that the signature was a mere matter of form: and, upon the faith of that representation, the plaintiff signed it.

The paper so signed was put in. It was an acknowledgment that the goods were received by the company upon the conditions set out in the replication, and was relied on by the defendants as showing that the goods were not received by them on the terms stated in the declaration, viz. as common carriers, but under the special contract. The clerk who wrote the receipt was called as a witness; but he stated that he had no recollection of the transaction, and could not tell whether or not the sum charged for the carriage was a special or mileage rate.

On the part of the plaintiff, it was insisted that it was not competent to the defendants to avail themselves of a contract the signature to which had been thus fraudulently obtained by their servant.

It was agreed that the goods were damaged to the extent of 21l.

The learned judge left it to the jury to say whether or not the goods were delivered to and received by the defendants to be carried under *624] a special contract,—*telling them, that, if they were not, the plaintiff was entitled to the verdict.

The jury found for the plaintiff.

Knowles, Q. C., pursuant to leave reserved, moved for a rule nisi to enter a verdict for the defendants, or for a new trial on the ground that the verdict was against the evidence. [COCKBURN, C. J.—The whole question was, whether the plaintiff signed the receipt knowing what he was about: and that the jury found against the company.] Assume

that the company's servant was guilty of a fraud, still the paper which the plaintiff signed was the contract upon which the goods were carried. [COCKBURN, C. J.—The plaintiff delivers the goods to the company as common carriers; and they induce him to sign a paper negating their receipt of the goods in that character, leading him all the while to believe that he is dealing with them as common carriers.] Whatever might have been passing in the plaintiff's mind, it is clear that the defendants received the goods only upon the terms mentioned in the special contract which the plaintiff signed. [WILLES, J.—Is not the defendants' promise that which their act induced the plaintiff to believe to be the promise? In Com. Dig. *Faît* (B. 2), it is said: "If an illiterate man executes a deed which is falsely read, or the sense declared different from the truth, it does not bind him: Amd. 9 H. 6, fo. 59 b, 2 Rol. 28, l. 5, *Thoroughgood's Case*, 2 Co. Rep. 9 b, *Throwgood v. Turnor*, F. Moore, 148, Moore, 184, pl. 326. As, if it be read to be upon a condition, when it is absolute: 2 Rol. 28, l. 25. So, it does not bind, if the false reading be by a stranger, any more than if by the party to whom the deed is given: *Thoroughgood's Case*, 2 Co. Rep. 9 b. So, though it be by a friend of him who executes it, without covin: *Thoroughgood's Case*, 2 Co. Rep. 9 b. So, if a man *lettered, but blind by age, &c., executes a deed falsely read, it does not [*625 bind him: 2 Rol. 28, l. 20. If a feoffment, with a letter of attorney, is falsely read, it is void for both: 2 Rol. 28, l. 27, *Pigot's Case*, 11 Co. Rep. 28 a."'] The general principle of law is not disputed: but the question is, what is the contract which the defendants have entered into? There are many cases where carriers have been held to be exonerated from their common law liability, by reason of the receipt by the consignor of a paper showing that they had not received the goods as common carriers.^(a) [CROWDER, J.—It is quite evident that the company, when they received the goods, did not intend the plaintiff to think that they received them otherwise than as common carriers. COCKBURN, C. J.—The plaintiff was not told that he would have his goods carried at a lower rate if he signed the paper, than if he did not.] *Shaw v. The York and North Midland Railway Company*, 13 Q. B. 347, is very much in point. There, the declaration alleged that the defendants received from the plaintiff a horse to be "safely and securely" carried by them, and there was a plea denying that the horse was delivered and received to be "safely and securely" carried, as alleged. At the trial, it appeared that the plaintiff had pointed out a

(a) See *Shaw v. The York and North Midland Railway Company*, 13 Q. B. 347 (E. C. L. R. vol. 66), *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 10 C. B. 454 (E. C. L. R. vol. 70), *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 16 Q. B. 600 (E. C. L. R. vol. 71), *Carr v. The Lancashire and Yorkshire Railway Company*, 7 Exch. 707, *Walker v. The York and North Midland Railway Company*, 2 Ellis & B. 750 (E. C. L. R. vol. 75), and *The York, Newcastle, and Berwick Railway Company*, App., Crisp, Resp., 16 C. B. 527 (E. C. L. R. vol. 78).

defect in one of the partitions of a horse-box shown to him for the reception of his horse; that a servant of the defendants then endeavoured to secure the partition, and assured the plaintiff *that he *626] had done so; that the horse was carried in that box; and that the horse's death was occasioned during the journey by the insecurity of the partition. A receipt was given to the plaintiff for the amount paid for the conveyance of the horse, at the foot of which receipt was written,—“N. B. This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage (however caused) occurring to horses or carriages, while travelling, or in loading or unloading:” and it was held that the terms of the memorandum formed part of the contract for the conveyance of the horse, and that they disproved the averment in the declaration that the defendants received the horse to be “safely and securely” carried. So, here, the receipt signed by the plaintiff at the time the goods were delivered at the warehouse of the company, was evidence that they were delivered to and received by the company, not as alleged in the declaration, but under a special contract. [CROWDER, J.—*Shaw v. The York and North Midland Railway Company* was not the case of a representation in a matter affecting the contract.]

COCKBURN, C. J.—I see no ground for finding fault with the verdict in this case. To hold the plaintiff bound by a contract foisted upon him under such circumstances, would be to permit the defendants to take advantage of their own fraud.

The rest of the court concurring,

Rule refused.

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*MICHAEL v. GILLESPIE. May 23.

Freight may be insured by a time policy, though for a period short of the time necessary to complete the voyage on which such freight is to be earned: and there is a *total loss of freight*, if the cargo be so damaged by a peril of the sea, in the course of the voyage, as to render it impossible (except at an expense which would greatly exceed its value on arrival) to carry it to its port of destination.

Freight was insured by a “club policy” from the 24th of January, 1852, to the 1st of March, 1852, subject to the rules of the association,—one of which was as follows: “That the committee, unless they receive ten days’ notice to the contrary, shall renew each policy on its expiration, except in cases where it may be deemed expedient not to renew the same, when the committee shall cause similar notice to be given to the parties.” No notice having been given:—Held, that this was a continuing policy, and not merely a policy to endure till the 1st of March.

THIS was an action by a shipowner against a member of a mutual insurance association, on a time policy on the freight of a cargo of coals.

The declaration stated, that the plaintiff, at the time of making the policy of insurance thereafter mentioned, was, and still was, a ship-

owner, and member, together with the defendant and divers other persons, of a certain association called The Whitby Insurance Association, and the ship or vessel thereafter mentioned was, from the day of the making of the policy of insurance thereafter mentioned, admitted and entered in the said society: That the plaintiff, on the 24th of January, 1852, caused to be made a certain policy of insurance, purporting thereby and containing therein that the plaintiff, as well in his own name as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, in part or in all, did make assurance, and caused himself and them and every of them to be insured, lost or not lost, at and from meridian of the 24th of January then current, to meridian of the 1st of March, 1852, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the Charles Kerr, whereof was master E. K., under God, for that voyage, or whomsoever else should go for master in the said ship, or by whatsoever other name or names the ship or the master thereof was or should be named or called, beginning the *adventure upon the said goods and mer- [*628
chandises from the loading thereof aboard the ship, upon the said ship, &c., *on cargo and freight*, and so should continue and endure during her abode there, upon the said ship, &c., and further until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandise whatsoever, should be arrived at as above, upon the said ship, &c., until she had moored at anchor twenty-four hours in good safety, and upon the goods, &c., until they should be then discharged and safely landed; and it should be lawful for the said ship, &c., in the said voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever, and without prejudice to the said insurance: The said ship, &c., goods and merchandises, &c., for so much as concerned the assured, by agreement between the assured and the assurers in the said policy, were and should be valued at interest: Touching the adventures and perils which the assurers were contented to bear, and did take upon them in the said voyage, they were of the seas, men of war, fire, enemies, &c., restraints, &c., of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof; and, in case of any loss or misfortune, it should be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travail for, in, and about the defence, safeguard, and recovery of the said goods and merchandises and ship, &c., or any part thereof, without prejudice to the said insurance, to the charges whereof the assurers would contribute, each one according to the rate and quality of his sum therein assured: That the

said writing or policy of assurance should be of as much force and effect as the surest writing or policy of assurance theretofore made *in Lombard Street, or in the Royal Exchange, or elsewhere in *629] London; and so the assurers were contented, and did thereby promise and bind themselves, each one for his own part, their heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises; having confessed themselves paid the consideration due unto them for the said assurance by the assured, at and after the rate of 20*l.* per cent.: And by a certain memorandum thereunder written, corn, fish, salt, fruit, flour, and seed were warranted free from average, unless general, or the ship should be stranded; sugar, tobacco, hemp, flax, hides, and skins were warranted free from average under 5*l.* per cent.; and all other goods, also the ship and freight, were warranted free from average under 3*l.* per cent., unless general or the ship should be stranded: And by a certain other memorandum thereunder written, it was mutually agreed that the regulations annexed to the said policy of assurance should form part of the said policy: And it was by the said regulations annexed to the said policy of assurance, amongst other things, declared,—that the members of the said association severally and respectively, and not jointly or in partnership, nor the one for the other of them, but each of them only in his own name, should insure each other from noon of the day of entry of each vessel into the said association, until noon of the first of March, 1852, against all general averages and total losses of cargo and freight, to the extent of 8*l.* or 16*l.* per keel, as might be entered by the owner, provided his interest at the time of loss should amount to the sum, otherwise only the actual loss sustained; and that the several rules and regulations following the said rule then in recital should be as binding and conclusive as if inserted in and made a component part of the said policy:—That ships lost in ballast should *630] be entitled to receive for *outfit one-fourth part of the sum entered,—That insurances might be effected by the said association on the cargo and freight of any ship insured in the Whitby Insurance Association, or approved of by the committee, and that, on being entered, the owner should pay 1*s.* per keel, to the extent of twelve keels, and 6*d.* per keel for each extra keel above that number on the entire burthen of the ship, and also for the policy duty and power of attorney,—That no claim would be allowed for the loss of cargo and freight in any ship when employed in any unlawful trade with the knowledge and consent of the insured, nor when loading or unloading on any main shores or beaches, excepting in vessels not exceeding six keels burthen, between the 25th of April, at noon, and the 15th of September, at noon, nor in any ships excepting those from the Mediterranean, or ports to the south of Gibraltar, sailing to the ports in the Gulf of Finland and Bothnia, after the 1st of October; Riga, the

ports in Riga Bay, or to Stockholm, after the 10th of October; lower ports in the Baltic, not higher than Memel, inclusive, nor to any port or place in the Bell Sound or Cattegat, above Gottenburg, after the 20th of October; Gottenburg and the ports in Norway, from the 10th of November to the 25th of February inclusive; the ports between Ostend and the Scaw, from the 20th of November to the 1st of February inclusive: ships sailing from the western coast of Great Britain (that is to say, between Falmouth and Duncansby Head), or from Ireland, to any of the ports above mentioned, should be required to sail ten days earlier: ships proceeding outwards in ballast seeking freight might move from port to port situate within the prescribed limits of sailing without restriction; but ships taking a cargo outwards, and afterwards changing ports for freight homeward, should, in case of loss or average, suffer a *deduction of 10 per cent., unless such ship [631 should have commenced her voyage ten days earlier than the time specified: nor when sailing from any port in Europe to the ports in the White Sea after the fifth of August; ports and places on the River St. Lawrence above Cape Gaspe after the 15th of August; British Colonies in North America (ports and places on the River St. Lawrence above Cape Gaspe excepted), after the 1st of September,—That no ships, excepting such as are classed A. 1, in Lloyd's register-book, should be insured when sailing to any port in America situate to the northward of 35 degrees north latitude after the 15th of June; neither should any lengthened ship of any classification, nor any ship unless classed A. 1, or Æ. 1, in Lloyd's register-book, be permitted to take a cargo outwards across the Atlantic,—as by the said policy and memoranda and regulations thereunto annexed, reference being thereunto had, would more fully and at large appear; of all which premises the defendants had notice. The declaration then went on to aver, that the said policy of assurance with the memoranda was so made by the plaintiff for and on behalf of himself, and that the insurance so made as aforesaid was made as aforesaid for the sole use of himself: That the said policy of insurance was then subscribed with the name of the defendant and divers other persons, and was then duly subscribed by an agent of the said several persons as assurers for the sum of 300*l*. upon the premises in the said policy of insurance mentioned: That a certain cargo of coals was shipped and loaded at Shields in and on board of the said ship or vessel in the said policy mentioned, to be carried and conveyed therein to Aden; and that the plaintiff was then and from thence continually afterwards until and at the time of the loss thereafter mentioned, interested in the freight of and for the said cargo of coals, to the amount of the money *insured or [632 caused to be insured thereon: That the said ship or vessel afterwards, and whilst she was protected by the said policy, that is to say, on the 25th of January, 1852, departed and set sail from Shields afore-

said upon the said voyage, and from thence until and at the time of the loss thereafter mentioned, was upon the high seas, and not employed, trading, laden, going, or sailing in any matter, or to or from any place, at any time prohibited by the said regulations of the said association: That the plaintiff then had and still has always performed and fulfilled the said regulations and everything which, on his part, as such member as aforesaid of the said association, and as such assured, were to be performed and fulfilled: That theretofore, and before the said 1st of March, and whilst the said ship or vessel was protected by the said policy, and before the arrival of the said ship at Aden aforesaid, the said ship or vessel, with the said cargo on board thereof, was by the perils and dangers of the seas, and by stormy and tempestuous weather, and the violence of the winds and waves, bulged, broken, and damaged, and was cast upon a rock, and was there broken, shattered, and destroyed, and the said cargo of coals so loaded in and on board of the said ship as aforesaid became and was *wholly lost*, and never did arrive at Aden aforesaid, and the said freight thereon was by reason of the premises wholly lost to the plaintiff,—of all which premises the defendant had notice: By means whereof, the defendant, as such insurer as aforesaid, became and was liable to pay the plaintiff a large sum of money, to wit, 800*l*.

First plea,—that the said policy in the declaration mentioned was not made or subscribed in manner and form as in the declaration alleged.

Second plea,—that, at the time of the making of the said policy, the said ship was lying in the river Tyne, in the port of Shields aforesaid, bound and about to *sail on the said voyage from Shields
*633] aforesaid to Aden aforesaid, which last-mentioned place is in parts beyond the seas, with the said cargo of coals then on board thereof; that the said policy was made in contemplation of the said voyage with a cargo of coals, and of no other voyage or cargo, and primarily in order to protect and insure the freight for and upon that voyage with such cargo of coals,—of which the plaintiff and defendant respectively at the time of the making of the said policy and the commencement of the said adventure had notice and knowledge; that the said ship, at the time of the making of the said policy and commencement of the said adventure, and from thence until the time of the happening of the loss and damage in the declaration mentioned, was, by and with the permission and privity of the plaintiff, greatly overladen by and with the said cargo of coals in the declaration mentioned, and also leaky and in a state of imperfect repair, and that, by reason thereof, the same cargo could not be carried on board the said ship on the said voyage with safety, or without great risk of being damaged and lost during the said voyage by reason of the said ship's being so overladen, leaky, and in a state of imperfect repair as aforesaid; and that, by reason

thereof, the said ship, at the time of the making of the said policy and the commencement of the said voyage and the said adventure, and thence until the time of the happening of the loss and damage in the declaration mentioned, was unseaworthy for the said voyage with the said cargo on board thereof,—of which premises the plaintiff during all that time had notice and knowledge, but of which the defendant had no notice or knowledge; that the plaintiff knowingly, wilfully, unlawfully, and improperly sent the said ship to sea on the said voyage in such unseaworthy state and condition, caused as aforesaid; and that the damage and loss in *the declaration mentioned happened [634 whilst the said ship was in such unseaworthy state and condition as aforesaid, and by reason of the ship being so unseaworthy in manner and from the cause aforesaid.

Third plea,—that the said ship called the Charles Kerr, in the said policy mentioned, for and during a long time, to wit, two weeks and more before the making of the said policy, and until and at the time of the making of the said policy, and from that time and until and at the time the said ship set sail upon the said voyage in the said policy mentioned, was lying and being in the river Tyne, with the said cargo of coals in the said policy mentioned in and on board of the said ship; that the said ship, before or whilst she was so lying or being in the said river, sprung divers leaks, and during all the time aforesaid greatly leaked and made much water, which premises were material to and greatly altered and increased the risk in the said policy in that behalf mentioned and insured against, and were material to be known by the defendant and the other members of the said association in the declaration mentioned who became insurers against the risks as in the declaration mentioned, and ought to have been communicated by the plaintiff to the defendant and the said other members of the said association,—of all which premises the plaintiff at the time of the making of the said policy, and from thence until the time the said ship so set sail on her said voyage, had notice and knowledge; but that the plaintiff wrongfully and improperly concealed and suppressed from the defendant and the other members of the said association, and each and every of them, the said premises and every part thereof, and the defendant and the said other members of the said association had not, nor had any or either of them, at the time of making the said policy, or at any time before the said ship set sail on the said *voyage, any notice or [635 knowledge thereof; and that the defendant and the said other members of the said association would not, nor would any or either of them, have subscribed or suffered their or any of their names or name to be subscribed to the said policy, if the said premises had been communicated to them or him by the plaintiff, as they ought to have been, before the said policy was made as in the declaration mentioned, and

would not have effected the said insurance in and by the said policy so effected as in the declaration mentioned.

Fourth plea,—that, before and at the time of the said ship or vessel departing and setting sail as in the declaration alleged, the same was in an unseaworthy state and condition, and it was dangerous for the said ship or vessel to go to sea in the state and condition in which she then was, with the said cargo on board thereof,—all which the plaintiff then well knew; that the plaintiff then was the owner and possessed of the said ship; and that the plaintiff, well knowing the premises, wrongfully suffered and permitted the said ship or vessel to depart and set sail upon the said voyage with the said cargo as in the declaration alleged, and sent the same to sea on the said voyage in the state and condition aforesaid; by reason of which premises the said ship or vessel and the cargo and freight became and were lost as in the declaration alleged.

Fifth plea,—that the said ship or vessel with the said cargo on board thereof, was not, nor was the said cargo, or any part thereof, lost by the perils, dangers, adventures, and causes in the declaration in that behalf mentioned, or any or either of them, as in the declaration was alleged; nor was the said cargo, or any part thereof, by reason of the causes in the declaration in that behalf mentioned, or any of them, prevented from arriving at Aden; nor was the freight thereon, or any *636] part thereof, by reason of the causes in the declaration *in that behalf mentioned, or any of them, lost to the plaintiff in manner and form as in the declaration alleged.

The plaintiff joined issue on the first plea, and took issue on each of the others.

The cause was tried before Cockburn, C. J., at the sittings in London after Michaelmas Term last. The facts were as follows:—The plaintiff was the owner of the *Charles Kerr*, and on the 24th of January, 1852, insured her in an association called the *Whitby Insurance Association*, of which the defendant was a member, by the policy declared upon, and which policy was subject, amongst others, to the following condition or regulation,—

“Rule 14. That the committee, unless they receive ten days’ notice to the contrary, shall renew each policy on its expiration, except in cases where it may be deemed expedient not to renew the same, when the committee shall cause similar notice to be given to the parties: but, in either case, when a ship may be at sea on the 5th of March, 1852, the committee shall, if required by the assured, grant a policy from that date until the arrival at her port of destination.”

The insurance was from the 24th of January, 1852, until the 1st of March, with a proviso for its renewal from time to time for a year, subject to the rules of the association.

The *Charles Kerr*, on the 25th of January, 1852, sailed from Shields

with a cargo of coals for Aden, where she could not have arrived until long after the 1st of March. Immediately after her departure she encountered tempestuous weather, and ultimately she was compelled, on the 8th of February, to put into Cuxhaven for repair, having fifteen or sixteen feet of water in her hold. It became necessary to unload the coals; and, when unloaded, they were found to be so *im-pregnated with deliquescent salts that it would have been [*637 extremely dangerous, according to the evidence of scientific witnesses, to carry them on in their then state to Aden, inasmuch as they would be liable to spontaneous ignition: and it was proved, that, owing to want of facilities for that purpose at Cuxhaven, it would have cost more than thrice their value (at Aden) to free them from the salts by washing, which alone would have enabled them to be carried with safety. Upon learning these facts, the owner of the coals abandoned them to the underwriters as a total loss, and the vessel, being repaired, proceeded upon another voyage.

On the part of the defendant it was objected,—first, that there was no loss of the subject-matter of insurance, inasmuch as the policy was a time policy from the 24th of January, 1852, until the 1st of March, and, as the vessel could not have arrived at Aden before the latter day, no freight could have been earned during the currency of the policy; and *Morby v. Jones*, 4 B. & C. 394 (E. C. L. R. vol. 82), 6 D. & R. 479 (E. C. L. R. vol. 16), was relied on,—secondly, that, although by a peril insured against the coals were in such a condition that it would cost more than their value to make it safe to carry them to their destination, yet, inasmuch as it was not physically impossible to carry them on, there was no total loss of freight.

Reserving the first point for the opinion of the court, the Lord Chief Justice left it to the jury to say whether under the circumstances there was not a total loss; telling them, that, in order to arrive at a determination of that question, they might take into their consideration the amount which would be required to be expended to restore the coals to a state which would have rendered it fit and safe to re-ship them.

The jury having returned a verdict for the plaintiff,

Shee, Serjt., in Hilary Term last, obtained a rule nisi *to [*638 enter a verdict for the defendant, or a nonsuit, “on the ground that the policy was a time policy for a period during which the freight could not be earned, and that the loss was not complete within that period;” or for a new trial “on the ground that the judge presiding at the trial misdirected the jury in telling them that whether or not there was a total loss on freight might depend upon the question of the expense at which the cargo might be restored to a state which would render it fit and safe to re-ship it.”

Byles, Serjt., *J. Brown*, and *M^cIntyre*, showed cause.—The first point in reality does not arise here; for, the policy was to enure, not

till the first of March, 1852, only, but up to that day and so on from year to year until put an end to by the notice contemplated by the 14th rule. The loss occurred before the 1st of March, when it became impossible, by reason of the sea-damage, to carry on the coals: and it is not the less a total loss of the freight at that time, though the freight could not have been earned within the time. [CRESSWELL, J.—When you insure freight you are insuring something which does not exist, and cannot at the time exist. Could you insure the expected profits to arise from the sale of a cargo of rice, as far as the Cape, on a voyage to England?] That is a very different matter. The underwriter who insures freight insures that the owner shall be in a condition to earn freight. [CRESSWELL, J.—When is the loss to be paid, and what is the extent of the underwriter's liability?] The assured would be entitled to be paid immediately, and the amount would be the present value of the freight which he was thereafter to receive. The policy, it is submitted, covers the whole time: and there is nothing inconsistent or incongruous in saying that freight may be lost before it is earned. In Phillips on Insurance, 3d *639] edit. Vol. I., *p. 684, a case of *Coit v. Smith*, 3 Johns. (American) Rep. 16, is referred to. That was an action on a policy upon horses from Liverpool to New York, "against all risks, including the risk of death from any cause whatever, until safely landed." One of the horses died three or four days after being landed, of injuries received in a gale on the voyage. Kent, then justice, states the question in such case to be, what was the condition of the article when landed? "One of the horses," he says, "received a death-wound during the voyage. The damages so received are a proper subject of retribution. How much damage ought to have been assessed at the time he was landed?" And the judgment upon this ground, which, the learned author observes, seems plainly to be the true one, was for the full value of the animal. [WILLIAMS, J., referred to *Meretony v. Dunlope*, 1 T. R. 260.] Mr. Phillips (*ubi supra*), speaking of that case, says that Willes, J., there "stated a preceding decision by the English K. B., where a ship insured for a certain time 'received her death-wound' from a peril insured against, three days before the end of the time, but, by pumping, was kept afloat till three days after it had ended, in which the verdict, being against the claim for the loss, was confirmed by the court. Mr. Justice Willes compares such a case to one of a policy on a life, where the party insured for a year receives a mortal wound during that time, of which he dies after the end of the year. But the cases are not parallel; to render them so, the insurance on the life should be, not against death merely, as a life-policy is, but against wound, as a ship is against the perils of the sea. The comparison is accordingly illusive." In 2 Phillips on Insurance, 345, it is laid down, upon the authority of a case of *Whitney v. The New York Firemen Insurance Company*, 18 Johns. (American), 208, that

"the absolute loss of the cargo, as of the ship, is a total loss of *freight, although the ship may be in a condition to continue [640 the voyage." And he adds: "Though the cargo is not wholly destroyed, yet if it is so damaged by the perils insured against that it cannot be carried on without endangering the health or lives of the crew, or so as to arrive at the port of destination as continuing to be the same description of goods as at the beginning of the risk, this constitutes a total loss of freight:" for which he cites *Hugg v. The Augusta Insurance Company*, 7 Howard's R. Sup. Ct. U. S. 595. "If," he continues, "the goods are sold by the master at an intermediate port, with the consent of the shipper, or under circumstances rendering the sale binding upon him, as being made in pursuance of the authority with which the master is invested by the emergency, a right to freight pro rata accrues, which is salvage under the policy on freight." To this the learned author adds the following note,— "According to *Vlierboom v. Chapman*, 13 M. & W. 230,† the entire freight is forfeited in such case, unless the shipper consents to the sale; meaning direct, and not merely constructive and implied consent. But the better doctrine seems to be as stated in the text." The real question is,—has the shipowner sustained a loss of freight by a peril insured against? By a peril of the sea, the cargo is damaged to such an extent that it is impossible,—not physically impossible, but impossible for any commercial purpose,—to carry it to its destination. *Jervis, C. J.*, thus lays down the rule *as to goods*, in *Rosetto v. Gurney*, 11 C. B. 176, 186 (E. C. L. R. vol. 73),—"As a general rule, where the whole or any part of a cargo is practically capable of being sent in a marketable state to its port of destination, the master cannot sell, nor can the assured recover as for a total loss. Whether a cargo can practically be forwarded to its port of destination, involves a consideration of all the circumstances of each particular case: and this word *'practically,' as explained by my Brother Maule in *Moss v. Smith*, 9 C. B. 94 (E. C. L. R. vol. 67), comprehends the [641 condition upon which the difference between a total and partial loss depends. 'In matters of business,' says that learned judge, 'a thing is commonly treated as impossible when it is impracticable, and as impracticable when it cannot be done without laying out more money than the thing is worth.' Thus, if goods are reduced to such a state, by sea-damage, as to be worth nothing if sent on, the master may sell them, and the owner may recover as for a constructive total loss: *Parry v. Aberdeen*, 9 B. & C. 411 (E. C. L. R. vol. 17), 4 M. & R. 343. So, if, from sea-damage, the goods cease to retain their original character, for instance, from the progress of putrefaction, the master is justified in selling, and the assured may recover a total loss: *Roux v. Salvador*, 3 N. C. 266 (E. C. L. R. vol. 32), 4 Scott, 1." There is no reason why the same principle should not apply to freight. Could the coals

here have been sent forward in their damaged state to their destination? If not, there is a total loss of freight. Upon these authorities, therefore,—to which may be added *Green v. The Royal Exchange Assurance Company*, 6 Taunt. 68, 1 Marsh. 447, and *Knight v. Faith*, 15 Q. B. 649 (E. C. L. R. vol. 69),—it is submitted that the direction of the Lord Chief Justice to the jury was quite correct, and that there is no pretence for disturbing the verdict.

Shee, Serjt., *Hugh Hill*, Q. C., and *J. Addison*, in support of the rule.—The facts are short and simple. The ship, though damaged, was reasonably repairable and was finally repaired, and proceeded upon another voyage. The charterer and owner of the cargo, who had paid 800*l.* of the 1200*l.* freight stipulated for by the charter-party, finding that he could not profitably pursue the adventure, abandoned it, and sold the coals, receiving back the 800*l.* which he had paid. The *642] owner of the ship purchased the coal, and afterwards resold it at a price nearly equal to its original cost. It appeared that the coal was only damaged to the extent of justifying an apprehension of its ignition in the course of a long voyage. It is submitted that the Lord Chief Justice misdirected the jury in telling them that there was a total loss of freight, if the goods were so damaged by perils of the sea that they could not be made fit for reshipment except at an expense which no prudent owner would incur,—meaning, of course, owner of the coals. [WILLIAMS, J.—I am not sure of that: he may have meant owner of the ship.] It was submitted on the part of the defendant, that the question of expense did not properly form an ingredient in the consideration of whether or not there had been a total loss of freight. And this argument was founded upon the case of *Morby v. Jones*, 4 B. & C. 394 (E. C. L. R. 10), 6 D. & R. 479 (E. C. L. R. 16), which is nearly identical with the present case. That was an action on a policy on freight. It appeared that the ship in the course of her voyage, having been injured by a peril of the sea, was obliged to put into a port and land the whole of her cargo. Part of the cargo had been so wetted by sea-water that it could not be re-shipped without danger of ignition, unless it went through a process which would have detained the vessel six weeks, and have been attended with an expense equal to the freight. Under these circumstances, the master sold these goods, and, finding he could not obtain others, he sailed on his voyage, and arrived at his port of destination with the rest of his cargo. The master's proceedings were such as a prudent man uninsured would have adopted. The underwriters were held not to be liable for the loss of the freight. In giving judgment, Abbott, C. J., after stating the facts, says: "The question was, whether, under *643] these circumstances, the underwriter was answerable pro tanto for the freight of the goods thus relanded and left behind: and there appears to be no case or decision exactly in point, and yet such

an occurrence must probably have happened many times, and upon the whole we are of opinion that the underwriter was not liable for the freight of these goods. It may be very true that the most prudent thing for the master of the ship might be, to leave the goods behind, and sail without them; but it does not therefore follow that the underwriter is to make good the freight thereby lost. If it should be held, in a case of this kind, that the underwriter would be liable to make it good, it would open a temptation to the master of a ship to sail away under circumstances like these, instead of stopping until the goods could be reshipped; which would be very mischievous. We think inconvenience would result by laying down a rule which should make the underwriter answerable in a case of this kind. It is very proper that the master should exercise a discretion whether it be more fit to leave the goods behind, and give up the value of the freight, than to bring them home. But it by no means follows as a consequence, that, if he does in the sound exercise of his discretion leave part of the goods behind, and his owner thereby loses freight *pro tanto*, that he can throw that loss on the underwriter." *Murdock v. Potts, Park, Ins.* 8th edit. 634, Marsh. *Ins.* 2d edit. 326, is very like this case. It was an action upon a policy of assurance *on freight* of the ship *Bethiah, at and from Bordeaux to Virginia*, warranted American ship and property: the declaration alleged that the ship was an American ship and the property of American subjects. The plaintiff proved the ship to be American, and it was to have been contended upon the part of the defendant, that the warranty extended to the goods on board as well as to the ship: but, upon the evidence, it appeared that the goods, *whether American or not, *were to be carried in the ship from Bordeaux to St. Domingo*, and that she was only to call at Norfolk in Virginia for orders; this rendered it unnecessary to discuss or decide the question upon the construction of the warranty, Lord Kenyon being of opinion that the underwriters upon this policy had a right to expect that the goods upon which the freight was payable were consigned to Virginia, and that, if the freight was payable for the carriage of them from Bordeaux to St. Domingo, the underwriters were not liable for the loss, though the ship was to call at Norfolk for orders, the freight payable being in such case different from the freight insured: the plaintiff was nonsuited, and no application was made to set aside the nonsuit. It is clear, upon the authorities, that, if the ship in consequence of sea-damage is prevented from pursuing the voyage, there is a total loss of the ship. It cannot be denied, also, that, if the goods are so damaged by means of a peril insured against that they cease to retain their original character, that would constitute a total loss of freight. [WILLIAMS, J.—Do you dispute the proposition, that, supposing the goods to be reduced by sea-damage to such a state that it is impossible to carry them to their destination without danger to

the ship or to the lives of the crew,—and therefore practically impossible to carry them at all,—that would amount to a total loss of freight?] It is submitted that there is no authority for that proposition. [COCKBURN, C. J.—Is it not clear upon principle, independent of authority?] At all events, that point does not arise here. At the utmost, here is only *a loss of the voyage*: *Brocklebank v. Sugrue*, 1 M. & Rob. 102. The coals still remained coals, except for the purposes of the particular voyage. [WILLIAMS, J.—My impression is, that, if it was impracticable to restore the coals so as to enable them *645] to be carried forward to their *destination, the freight is totally lost, although there has not been a total loss of ship or goods.] There can be no total loss, if any part of the freight has been received: and, here, in substance, freight *pro ratâ itineris* was earned. [COCKBURN, C. J.—This point was not made at the trial.] It was not, unless it is involved in the question of total loss of freight. The point reserved was, that this was a time policy from the 24th of January to the 1st of March,—subject to the right to renew, unless notice was given under the 14th rule; and that, no such notice having been given, the loss was not complete within the time mentioned. [COCKBURN, C. J.—Unless notice was given, the policy would be a continuing policy.] *Taylor v. Wilson*, 15 East, 324, at first sight, seems adverse to the defendant. It was there held, that freight may be insured for part of a voyage. The vessel sailed with a cargo from St. Ube's for Gottenburgh, with intent to proceed from St. Ube's to Portsmouth, to take up convoy on her way to Gottenburgh; the underwriters having no notice that the ultimate destination of the ship and cargo was Gottenburgh. But there there was an express contract. The owner may have thought fit to insure for the more dangerous part of the voyage. [COCKBURN, C. J.—Why may not a man insure for a portion of the duration in point of time as well as of distance?] The effect is, that he is insuring for a voyage not designated, for a very inadequate premium. [COCKBURN, C. J.—Would not that remark be equally applicable to the facts in *Taylor v. Wilson*? CRESSWELL, J.—It seems to me rather to resolve itself into a question whether or not the party had an insurable interest. If he had, I do not see why he may not insure it for a month or for any other time. The case of *Taylor v. Wilson* only fortifies the opinion we all I believe entertained before.] The rule is thus stated in *Arnould on Insurance*, Vol. I., p. *646] 230,—“A *vested interest in possession is not necessary to give the right of insuring. An expectancy, coupled with a *present existing title* to that out of which the expectancy arises, is an insurable interest. Inchoate rights founded on titles subsisting at the time of loss are insurable interests: thus, freight payable either on the arrival of the goods, or under a charter-party, is insurable by the *shipowner*, provided his title to the freight *has accrued at the time of loss*, so that

nothing but the intervention of the loss can prevent him from earning it." *Murdock v. Potts* is observed upon by Lord Ellenborough in *Taylor v. Wilson*; but it is cited without disapprobation in *Hall, App.*, *Brown, Resp.*, 2 Dow, P. C. 367.

CRESSWELL, J.—The Lord Chief Justice wishes me to express my opinion first, inasmuch as one ground of the motion was that he was supposed to have misdirected the jury. I entirely agree with him that the expense of putting the coals in a state to enable them to be carried safely to their destination was a very fit object of inquiry. It would be just as reasonable to call upon the shipowner to incur great expense in the repair of the ship when she has sustained damage to such an extent, that, when repaired, she would be worth less than the sum laid out upon her, as to call upon him to incur an expense, in order to carry the cargo to its destination, which would greatly exceed its value(?) when it got there. I therefore think there is no ground for a new trial in this case upon the score of misdirection. With regard to the other question, as to the effect of the policy, it is to be observed that it is one of a somewhat novel character. The rules of club-policies have not usually been applied to policies on freight. It seems, however, that these time policies are greatly on the increase. With regard to the *particular question now before the court, it seems to me to be free from any serious doubt. It cannot be denied, that, where [*647 a contract for freight is made, and the goods are prepared and actually on board, the shipowner who has contracted to carry them has an inchoate right to the money agreed to be paid, and that gives him an insurable interest. That being so, I do not see why he may not insure such freight for a week or a month, or for distance, or for a voyage. For instance, where the voyage is from the port of London to the West Indies, why may he not insure as far as Portsmouth? There is nothing unreasonable in such a contract. In *Murdock v. Potts*, Lord Kenyon seems to have proceeded upon the ground that there was no such freight as that from Bordeaux to Virginia, which was the subject of insurance in that case. Here, the owner having contracted for freight, that freight was at risk. The insurer says, "I will insure your interest in the freight from a given day to a given day." By one of the perils insured against, the freight is lost before the day mentioned for the termination of the risk. It seems to me to fall within the ordinary case of a loss by a peril insured against. I see no ground for disturbing the verdict.

WILLIAMS, J.—I entirely agree with my Brother Cresswell upon the last point: I will, therefore, confine myself, in the few remarks I have to make, to the imputation of misdirection, which is, in accordance with the objection urged on the part of the defendant at the trial, founded upon an exaggerated notion of the doctrine of *Morby v. Jones*, 4 B. & C. 394 (E. C. L. R. vol. 10), 6 D. & R. 479 (E. C. L. R. vol.

16), that, to entitle him to freight, the shipowner must have actually carried the goods to their destination. I think that doctrine is not fairly deducible from the decision in *Morby v. Jones*. If it were, I for *648] one should not be disposed to agree with it, inasmuch as it involves, as it seems to me, a striking absurdity. It is easy to suggest cases where it would be ridiculous to expect the owner to pursue the adventure,—it might be that the expense of putting the goods into a fit condition to proceed, would many times exceed their presumed value when arrived at their destination.

WILLES, J.—I am of the same opinion. As to the first question, it appears to me that the policy is a contract with the shipowner to warrant him against loss by reason of damage arising from any of the perils insured against, within the period mentioned therein. These policies are made renewable from year to year, on account of the stamp duties. It appears to me that there was a sufficient probability that the insured would continue a member of the club down to the time that the freight which was the subject of insurance would have been earned, and that matters would remain as they were. It clearly must have been intended that the insurance should cover the freight during the voyage, unless the contract were put an end to by the notice provided by the 14th rule. I therefore think, upon either of the grounds urged by my Brother *Byles*, that this policy does extend to cover the freight in question although it might not have been actually earned until after the expiration of the term specially mentioned therein. Upon the first point, therefore, I am of opinion that there is no reason for holding that the defendant is entitled to have his rule made absolute. As to the second point upon which the rule was moved, the argument for the defendant in truth amounts to what Mr. *Addison* contended for, viz. that *no* loss of the *cargo* can be considered a loss of *freight* within the terms of this policy. That clearly could not have been the intention of the policy. If the goods the carriage of which is *649] to entitle the shipowner to freight are lost, the freight is as much lost as if the ship herself were lost. The question simply comes to this,—whether a person who can only earn 100*l.* freight by expending 1000*l.* in restoring goods damaged by a peril of the sea to a condition to enable them to be carried forward to their destination, can be said not to have sustained a loss of the freight by a peril of the sea. The proposition needs only to be stated, to suggest the only answer that could be given to it. Upon the point reserved, therefore, I think the defendant has failed to show that the verdict was wrong; and I think there was no misdirection.

COCKBURN, C. J.—I am of the same opinion. As to the first point, I am disposed to think that this is a continuing policy, by reason of the provision contained in the 14th regulation, that it should be renewed for another year unless notice be given on either side to put an end to

the contract. But, independently of that, I do not see why freight should not be insured by a time policy, even though the freight should not be actually earned within the time mentioned in the policy. The case of *Taylor v. Wilson*, 15 East, 824, where it was held that freight might be insured from St. Ube's to Portsmouth, upon a ship which sailed with a cargo from St. Ube's for Gottenburg, with intent first to proceed to Portsmouth, seems to me to be applicable here. I see no reason why, if the earlier part of the voyage is peculiarly perilous, the owner may not cover his freight,—his expected profit,—by an insurance applicable to that part only. And there is no hardship on the underwriter: he receives his premium on the whole amount of the freight, which cannot be earned till the completion of the voyage. As to the second point, I have heard nothing in the argument,—able as it has been,—to satisfy me that the proposition *contended for, [*650 viz. that the question whether there is a total loss on freight where the goods are so damaged by a peril of the sea as to be incapable, except at a cost which no prudent owner would incur, of being carried to their destination, is not an essential ingredient in the consideration of this case, is tenable. It is now well settled, with regard to a policy on ship or on cargo, that, where either has sustained damage by a peril insured against, but is capable of being restored so that the ship may proceed and the cargo be carried to its destination, the question whether there has been a total loss or not depends upon whether that result may be obtained by the expenditure of a sum such as a prudent owner uninsured would reasonably be expected to incur. I see no reason why the same principle should not apply to an insurance on freight. The shipowner insures his freight with a view to protect himself against a loss of that freight by the loss of the goods by the carriage of which it is to be earned. If, in order to enable him to carry the goods to their destination, the shipowner is bound to expend upon them an amount which would eat up the whole freight to be earned by the voyage, it is clear that he would be incurring that expense, not for his own benefit, but for that of the underwriters. The effect would be, that, to obtain immunity to the underwriter, the owner would be doubling his own risk. It seems to me, therefore, that the principle which is admitted to be applicable in the case of a policy on a ship or on goods, is equally applicable to a policy on freight. It was clearly proved here that the coals could not be reshipped and carried to their destination in their then state: but that they might have been restored, though at an expense far exceeding their value, by reason of the difficulty of obtaining a sufficient quantity of water to free them from the salt with which they had become *impregnated. My Brother [*651 *Shee* insisted that the sole question for the jury to consider, was, whether or not it was physically practicable to put them in a state to be carried forward. But I thought the real question was, not whether

it was physically practicable, but whether it was *commercially* practicable, and therefore I also put to them the question of expense.

Rule discharged.

SMITH v. THE MAYOR, ALDERMEN, and BURGESSES o.
THE BOROUGH of HARWICH. June 2.

An agreement was entered into between the corporation of Harwich and S., a contractor for works, whereby the corporation agreed to let to S. the making, constructing, and completing certain works which they were empowered by an act of parliament to make, according to a specification and plans annexed, at or for the sum of 12,305*l.*, and "on the conditions and in manner hereinafter mentioned;" and S. agreed to take the said works and complete the same in manner set forth in the specification, and for the sums and subject to the provisions therein-after mentioned. The agreement then went on to provide that S. should construct certain of the works, described in the specification as the "first portion" thereof, for 7318*l.*, to be paid as in the specification mentioned; and that he should also construct the "second portion," as described, for 4987*l.*, subject to the following provisions, that is to say,— "that the assent of the commissioners of woods and forests shall be given to the said mayor, &c., to carry out the said last-mentioned works, so far as the same affect the land or soil, &c., of the crown,—and that the said mayor, &c., are not prevented from carrying out the said last-mentioned works by the Eastern Union Railway Company, &c.,—and, further, that the approbation of the lords commissioners of the treasury is given to the said mayor, &c., to borrow on bond or on mortgage of the rates and property of the borough, &c., such sum or sums of money as may enable the said mayor, &c., to pay for the same."

In an action by S. against the corporation upon this agreement, the declaration assigned for breach that the defendants had omitted within a reasonable time to procure and obtain the assent of the commissioners of woods and forests, and the approbation of the lords commissioners of the treasury, as in the agreement mentioned, or to permit the plaintiff to commence the second portion of the said works:—

Held, that there was nothing in the language of the agreement to warrant the court in implying a covenant on the part of the corporation to obtain the assent and approbation therein mentioned.

THE declaration stated, that, on the 15th of April, 1852, a certain memorandum of agreement under seal *was made and entered
*652] into by and between the defendants of the one part, and the plaintiff of the other part, and sealed with the corporate seal of the defendants, which was and is in the words and figures following,—
"Memorandum of agreement made and entered into this 15th day of April, 1852, between the Mayor, Aldermen, and Burgesses of the borough of Harwich, in the county of Essex, of the one part, and Edmund Smith, of Woolwich, in the county of Kent, contractor for works, of the other part,—Whereby the said mayor, aldermen, and burgesses agree to let to the said Edmund Smith the making, constructing, and completing of the several works empowered to be made under and by virtue of the act of parliament made and passed in the last session, and intituled 'The Harwich Improvement Quays and Pier Act, 1851' (14 & 15 Vict. c. xlii.), and which works are fully set forth and described or laid down in the specification as altered in ink and plans hereunto annexed, at or for the price or sum of 12,305*l.*, and on the conditions and in manner hereinafter mentioned: And the said Edmund

Smith hereby agrees and contracts with the said mayor, aldermen, and burgesses to take the said work and to construct, make, and complete the same in manner set forth in the said specification, and for the several sums, and subject to the provisions hereinafter mentioned and contained, that is to say, That he the said Edmund Smith, his executors and administrators, shall and will well, truly, and faithfully construct, make, and execute the pier and the cant thereof, part of the wharfing, and filling in at the back thereof, and also the dredging and other works mentioned and described in the said specification as *the first portion* of the said works, and as laid down on the said plans, and comprised within the letters, numbers, and colours mentioned in the same specification, with reference to the said plans, at and for the price or sum *of 7318*l.*, to be paid in manner set forth in the said specification: and that he and they shall and will also well, truly, and [*658 faithfully construct, make, and execute *the second portion* of the said works as set forth and described in the said specification, and laid down on the said plans, at and for the price or sum of 4987*l.*, subject to the following provisions, that is to say, that the assent of the commissioners of Her Majesty's woods, forests, land revenues, works, and buildings shall be given to *the said mayor, aldermen, and burgesses* to carry out the said last-mentioned works, so far as the same affect the land or soil, or any rights in respect thereof, belonging to Her Majesty in right of Her crown; and that the said mayor, aldermen, and burgesses are not prevented from carrying out the same last-mentioned works by the Eastern Union Railway Company, or any other company, or by any person or persons under or by virtue of the power given to the said railway company for making part of the said last-mentioned works; and further that the approbation of the lords commissioners of Her Majesty's treasury is given to *the said mayor, aldermen, and burgesses* to borrow on bond or on mortgage of the rates and property of the borough, and of the rates and tolls to be levied and property to be created by virtue of the said act, such sum or sums of money as may enable the said mayor, aldermen, and burgesses to pay for the same; and which said sum of 4987*l.* is also to be paid in manner set forth in the said specification: And he the said Edmund Smith doth, for himself, his executors and administrators, further agree, that, immediately on the execution of these presents, and from time to time until the completion of the said contract or contracts, he and they shall and will obey, carry out, and perform all and every the provisions and stipulations provided in the said specification to be obeyed, carried out, and performed: And *the said mayor, aldermen, and burgesses hereby [*654 promise and agree that they and their successors in the said corporation shall and will well and truly pay or cause to be paid to the said Edmund Smith, his executors or administrators, all and every sum and sums of money which may hereafter become due and payable

to him by virtue of these presents, and in manner set forth in the said specification, and on their parts shall and will duly carry out and perform all and every the provisions and stipulations provided in the said specification to be obeyed, carried out, and performed : And it is hereby mutually agreed, that, on the request of either party hereto, a further and more formal contract and agreement for the due and faithful carrying out and performance of the several matters and things hereinbefore mentioned and contained, or herein referred to, shall be prepared and executed on their respective parts and as provided by the said specification : Given under the common seal of the borough of Harwich at a meeting of the council of the said borough duly convened, and held on the 26th of April, 1852." Averment, that, by the said specification in the said memorandum of agreement mentioned and referred to, the defendants, amongst other things, engaged and promised that they would make payments of 80*l.* per cent. within fourteen days from the period that their engineer should have certified to them that the plaintiff had completed work and delivered materials to the extent of 1000*l.*, and, after that, to make payments in the same proportion within fourteen days after the delivery by the said engineer of each monthly certificate ; that the balance due on the contract at the completion of the works should be paid for, half at the expiration of six months, and the remainder at the expiration of twelve months from the date of the said engineer's certificate ; but such balance to carry interest at the rate of *655] 4*l.* per centum per annum : Breach that, although the plaintiff did well and truly construct, make, and execute the said pier, and the cant thereof, part of the wharfing, and filling in at the back thereof, and also the dredging, and all other works mentioned and described in the said specification as *the first portion* of the said works, and as laid down on the said plans by the said memorandum of agreement referred to ; and although before the commencement of the suit all things were done and happened to entitle the plaintiff to be paid by the defendants the said sum of 7318*l.* ; yet the defendants had not paid the same, or any part thereof : And the plaintiff further said that he had at all times been ready and willing to commence the construction and execution of the said second portion of the said works, and long since, and before the defendants suffered and permitted the plaintiff to commence the same, all things had been done and happened to entitle the plaintiff to have done and performed by the defendants all things which were according to the said memorandum of agreement by the defendants to be done before the said second portion of the said works could be commenced ; and although the defendants could and might within a reasonable time after the making of the said memorandum of agreement have procured and obtained the assent of the said commissioners of Her Majesty's woods, forests, &c., and also the approbation of the said lords commissioners of Her Majesty's treasury, as in the said memo-

randum of agreement was mentioned and provided for; and although it was necessary that such assent and approbation should be obtained; and although the defendants could and might within such reasonable time have suffered and permitted the plaintiff to commence such second portion of the said works; yet the defendants wrongfully and improperly omitted to procure or obtain the said assent *or the said approbation within such reasonable time, or within such time to suffer or permit the plaintiff to commence such second portion of the said works, and wrongfully and improperly hindered and delayed the plaintiff in commencing such portion, whereby the plaintiff was prevented from commencing and working at such second portion of the said works as soon as he otherwise might and would have done, and was forced and compelled to pay higher prices for materials and labour than otherwise he would have had to pay, and was deprived of great profits and gains which he otherwise would have made from the performance of such works. [*656]

The defendants demurred to the second breach,—the ground of demurrer stated in the margin being, “that the deed contains no covenant to which the second breach in the first count is applicable.”

Second plea,—to the first breach,—that the approbation of the lords commissioners of Her Majesty’s treasury was not at any time given to the defendants to borrow on bond, or on mortgage of the rates and tolls to be levied, and the property to be created, by virtue of the said act, such sum or sums of money as might enable the defendants to pay for the same, or any part of the amount of the moneys alleged to have been unpaid to the plaintiff, as in the first breach therein mentioned.

The plaintiff demurred to the second plea,—the ground of demurrer stated in the margin being, “that the giving of the approbation in the second plea mentioned was not a condition precedent to the performance of the covenant to the breach of which the second plea is pleaded.”

Fifth plea,—to the first count of the declaration, except so far as the same related to the alleged breach of covenant in that count first above assigned,—that the *said specification, as altered in ink in the said deed in the first count mentioned, contained the provisions and stipulations following, that is to say,—“The contract to be entered into is to be with the Mayor, Aldermen, and Burgesses of Harwich, and is to be for the carrying into execution the whole or a portion of the works hereinafter described, which they are empowered to execute under their act of parliament of the 14th and 15th Victoria. The contract comprises the erection of a timber pier extending from the shore adjacent to Angel Quay, in a north-westerly direction, with a cant or arm to the eastward forming a pier or harbour between it and the shore. Also the erection of the whole or a portion of the timber quaying authorized to be constructed by the above recited act, with the necessary excavation and dredging to form the approaches to allow of [*657]

vessels coming alongside the said pier and wharfs, which excavation and dredging is to be filled in behind the timber wharfing, there to form embanked approaches to the said pier, as well as a convenient line of quays and roadway." "The corporation reserve to themselves the power of proceeding with only a portion of the works, or the whole, as may be determined on. It will therefore be necessary that the contractor should tender in two separate portions, as follows:—The first portion to comprise the wharfing A. B. C. D. and E., and the filling of the enclosed space with the boat-landing; the excavation from section No. 1 to 9, with portions of 10 and 11, and as far as I.; the formation of the pier and cant, and the breaking up and applying the breakwater ships: the colouring of this portion of the contract is of the dark shade in pink and green: The second portion to comprise the wharfing D. J. M. N. L., and the filling of the enclosed space as far as the material will go, and the excavation of the space D. I. K.: the *658] colouring of this portion is of the lighter shade in pink and green:" And that the said "first portion" and "second portion" mentioned in the provisions and stipulations thereinbefore set forth were and are the same first portion and second portion of the works in the deed in the first count of the declaration mentioned.

Replication,—that, before the making of the memorandum of agreement in the first count mentioned, and before the alteration of the specification in the said first count and in the fifth plea mentioned, the defendants caused to be issued and delivered to the plaintiff and to others, contractors, for the purpose of enabling and inducing them to tender for the works therein referred to, a certain specification of works to be executed, which was in the words, letters, and figures following,—[After setting out the specification, the replication proceeded] —That, after such specification was so issued, the plaintiff, being a contractor, did in accordance therewith make two several tenders to the defendants for the two portions of the said works in the said specification respectively mentioned and described, that is to say, one tender for the first of the said two portions, and another for the second of the said two portions, which said tenders were then accepted and assented to by the defendants: That, after such acceptance and assent, the defendants determined on proceeding with the whole of the said works, that is to say, both portions of the said works in the specification mentioned, and then made known such determination to the plaintiff; and thereupon, and by reason of such determination, it became and was unnecessary to execute a portion of the works in the said specification mentioned and therein referred to as the wharfing from D. to E.; whereupon, before the making of the said contract in the said first count of the declaration mentioned, the said specification was with the assent *659] of the plaintiff and of the defendants altered by striking out in ink the following,—“should the whole be proceeded with,

there will be a proportionate reduction for the wharfing from D. to E., if not executed:” And that such specification so altered then became and was the specification as altered in ink in the said first count and in the said fifth plea mentioned.

Demurrer,—the ground stated in the margin being, “that the striking out of the specification of the words in that replication lastly set forth, did not deprive the defendants of their option to proceed with the second portion of the works or not, as they should think fit.” Joinder.

C. Pollock (with whom were E. James, Q. C., and Bovill, Q. C.), for the plaintiff.(a)—[Lush, for the *defendants, intimated that he [£600 did not mean to rely on the second plea.] The second breach assigned in the declaration is founded upon the three conditions upon which the plaintiff was to perform the second portion of the work, viz., the procurement of the assent of the commissioners of woods and forests, the non-interference of the Eastern Union Railway Company, and the approbation of the lords commissioners of the treasury to the raising of the money by the corporation in the manner mentioned. Now, the assent of the commissioners of woods and forests was to be given to the corporation; and the approbation of the lords of the treasury was required to authorize the corporation to raise money on bond or by mortgage of their tolls and rates. It clearly must have been intended that these should be obtained by the defendants, to enable the plaintiff to proceed with the second portion of the work. [COCKBURN, C. J.—It comes by way of proviso in that part of the agreement which

(a) The points marked for argument on the part of the plaintiff, were as follows:—

As to the demurrer to the second breach,—“that such breach discloses a good cause of action,—that the defendants ought within a reasonable time to have obtained the assent of the commissioners of the woods and forests, and also the approbation of the lords of the treasury,—that, in construing the agreement declared upon, effect must be given to the manifest intention of the parties thereto, whether expressed or implied, and to the substance thereof,—and that the defendants ought within a reasonable time to have permitted and enabled the plaintiff to commence the second portion of the works.”

As to the demurrer to the second plea,—“that the second plea contains no good answer to the first breach,—that the approbation of the commissioners of the treasury was not a condition precedent to the payment by the defendants of the sum mentioned in the first breach,—that, if such approbation were a condition precedent, the obtaining of it was the duty of the defendants, and not of the plaintiff, and also that the second plea was bad for not alleging that the defendants were unable to obtain it, or had used any efforts to do so,—that the payment of the sum mentioned in the first breach did not depend upon the defendants’ borrowing money,—and that the second plea did not aver that it was necessary for the defendants to borrow money in order to pay the plaintiff such sum, and that it was consistent with the facts alleged in that plea that the defendants could have paid such sum without borrowing.”

As to the demurrer to the replication to the fifth plea,—“that, upon the true construction of the agreement declared upon, coupled with the specification, and the facts averred in the said replication, the defendants were bound to go on with both portions of the work,—that the option reserved to the defendants by the specification of proceeding with only a portion of the works, ceased to exist upon the making of the agreement sued upon,—that such option is inconsistent with and repugnant to the other provisions of the agreement declared on, and to the general intent thereof, and therefore the clause containing such option must be rejected,—and that the making by the defendants of the contract sued on was a waiver of the option, or an exercise of it in favour of the plaintiff’s view.”

deals with what the contractor covenants to do.] The position of the

*661] *words will not affect their construction: the whole agreement must be taken together, in order to ascertain what the parties have contracted for. The work is to be paid for in a given manner: it is only by the permission of the lords of the treasury that the defendants could raise the money; and they alone could apply for the approbation of the treasury to their so doing. [COCKBURN, C. J.—You contend that there is an implied covenant on the defendants' part to obtain the requisite assent and approbation?] Clearly so. No particular words are necessary to constitute a covenant: it is enough that the court can see upon the whole instrument that the parties have mutually agreed to do something. *Porcher v. Gardner*, 8 C. B. 461, shows that the court will not look for any special form of words, but will look to the substance of the agreement. There, by articles of agreement between the plaintiffs, trustees of a marriage settlement, and the defendants, three of the committee of management of a projected railway company,—reciting that a bill for the formation of the railway was pending in the House of Commons, and that the railway was intended to pass through a certain park which was subject to the settlement,—it was agreed, that, if the bill should pass into a law in the then present or the next session, the company should, within six calendar months after the passing of the bill, and before commencing the railway on any part of the said park and hereditaments, pay the plaintiffs 11,700*l.*; and that, in consideration of that sum, the company should have conveyed to them nineteen acres of the said land, &c.,—*the whole of the said agreement to be null and void, unless sanctioned by the Court of Chancery in a cause of Lawrence v. Porcher, and so much of that agreement as the court should require should be inserted in the act*: and it was held, that the plaintiffs' obtaining the sanction of the

*662] court *to the agreement *within six months of the passing of the bill*, was a condition precedent to their right to sue the defendants for the money. [COCKBURN, C. J.—In that case, the consideration for the payment of the money by the railway company, was, the conveyance of the land to them with a good title. To enable them to make a good title, the plaintiffs were bound to procure the consent of the Court of Chancery. Here, the very language of the deed attaches the proviso or condition to the covenant of the contractor to do the work. Had it been annexed to the covenants of the defendants, the case would have been different: but, can we change its position in order to give effect to your construction of the deed? It is difficult to see, if it be a qualification of the plaintiff's contract, how it can impose any obligation upon the defendants.] The authority above referred to shows that the substance of the contract is to be regarded rather than the particular allocation of the clauses. The same doctrine is laid down in many cases: see, amongst others, *Wood v. The Copper-Miners Company*, 7

C. B. 906 (E. C. L. R. vol. 62), 14 C. B. 428 (E. C. L. R. vol. 78), 15 C. B. 464 (E. C. L. R. vol. 80), 18 C. B. 561 (E. C. L. R. vol. 86), *Harrison v. The Great Northern Railway Company*, 11 C. B. 542, 815 (E. C. L. R. vol. 78), 12 C. B. 576 (E. C. L. R. vol. 74), *Aulton v. Atkyns*, 18 C. B. 249 (E. C. L. R. vol. 86). The stipulation for a more formal instrument affords an additional reason for giving a liberal construction to this agreement. [COCKBURN, C. J.—You are, in effect, asking us to import into this agreement a notion that the commissioners referred to can only deal with the corporation. How can we assume that the *plaintiff* might not have obtained the necessary assent and approbation?] The assent and approbation of the respective commissioners must of necessity be given to the corporation, who alone could act upon them. (a) The replication to the fifth *plea in substance sets out the whole of the specification upon which the agreement [*663] is founded. It appears, that, after the plaintiff's tender for the works therein described, the specification was altered by striking out a portion, and the agreement was made referring to the specification so altered. The reservation by the defendants of the power of proceeding with only a portion of the works, or the whole, as might be determined on, is repugnant and inconsistent with the sense in which the agreement is to be read, taken all together. The court will reject a provision the use of which is obviously gone. [COCKBURN, C. J.—There is no provision in the *contract that the corporation shall have [*664] power to withdraw from the second portion of the works: and it may be a question how far the agreement is to be controlled by the specification, which is referred to, but not incorporated into it.]

Lush (with whom was *J. Brown*), contra. (b)—There is no contract on the part of the defendants to procure the assent and approbation.

(a) The 36th section of the 14 & 15 Vict. c. xlii., enacts, "that nothing in this act contained shall extend or be construed to extend to enable the said corporation to sell, demise, mortgage, or alienate, for the purposes of this act, without the approbation of the lords commissioners of Her Majesty's treasury, or any three of them, any messuages, lands, tenements, or hereditaments which they could not have sold, demised, mortgaged, or alienated without such approbation before the passing of this act, anything in this act to the contrary notwithstanding."

And s. 39 enacts "that nothing contained in the recited acts † or in this act shall extend to authorize the company to purchase, take, or use any land or soil, or any rights in respect thereof, belonging to Her Majesty in right of Her crown, without the consent in writing of the commissioners for the time being of Her Majesty's woods, forests, land revenues, works, and buildings, or any two of them, first had and obtained for that purpose, and which such commissioners, or any two of them, are hereby authorized and empowered to give, or to prejudice, diminish, alter, or take away any of the rights, privileges, powers, or authorities vested in or enjoyed by Her Majesty, her heirs and successors."

(b) The points marked for argument, on the part of the defendants, were,—

"1. That the deed contains no covenant, express or implied, on the part of the defendants, to procure the consents of the authorities mentioned in the contract:

"2. That, by the contract between the parties, the defendants had an option to do or to abandon the second portion of the works."

† The 59 G. 3, c. cxviii., for paving, &c., the town of Harwich, "The Lands Clauses Consolidation Act, 1845" (8 & 9 Vict. c. 18), and "The Harbour, Dock, and Pier Clauses Consolidation Act, 1847" (10 & 11 Vict. c. 27).

referred to in the agreement: all they contract for is, that, if the works are to be done, the plaintiff shall do them, and they will pay for them. The defendants could not use crown lands without the consent in writing of the commissioners of woods and forests, or pledge the corporate property, or the rates and tolls of the borough, without the approbation of the lords of the treasury. The plaintiff, therefore, might well contract to see that that assent and approbation were obtained; and such a matter might very properly be placed as a qualification of his covenant to do the work. Assume that it is a condition inserted for the benefit of both, the court cannot, it is submitted, imply therefrom a *covenant* on the part of the defendants to obtain the assent and approbation of the respective commissioners. Would they be bound to accept such assent upon whatever terms the crown might choose to impose? *Rashleigh v. The Eastern Counties Railway Company*, 10 C. B. 612 (E. C. L. R. vol. 70), was a much stronger case than this. There, Maule, *665] J., in delivering the judgment of the court, lays down *the true principle by which the decision of this case will be governed. "It was rightly conceded on the argument," he says, "and is undoubted law, that no particular word, or form of words, is necessary to create a covenant; but that any words are sufficient for that purpose, *which show an intention to be bound by the deed to do or omit that which is the subject of the covenant*: any such words are sufficient, *and some such words are necessary*, to make a covenant. It was argued, in the present case, that the several covenants by which the defendants bound themselves to do certain things (as, to build a bridge over the new cut, and fill up the old course of the stream, after it had been diverted, and to reconvey the slip forming the new course of the river,) which are incidental to, or to be done after, the new cut is made, and the stream diverted, being in their terms absolute, and not conditional on the making of the new cut and diversion of the stream, show a clear intention that the defendants meant to bind themselves to do that principal act of making the cut and diverting the stream, to which the things which they in express terms absolutely covenanted to do were identical. But we think that such an intention cannot properly be inferred: the true inference, as it appears to us, is, that the parties to the deed both of them expected that the new cut would be made, and the stream diverted, and entered into the contract in question under that expectation,—treating it as a thing that was certain to take place, and providing for that event only: but it by no means follows from this state of things that the parties intended that the defendants should bind themselves by the deed to make the cut, and divert the stream, any more than a covenant to lay down the permanent rails, or to complete the railway, is to be inferred from the covenants to do certain things after those events. No reason has been suggested, why, if the defend-

ants *were really intended to be bound as the plaintiffs contend, [*666 in a deed of which the sole object is to express the covenants by which the defendants were to be bound to the plaintiffs, the principal thing to be done by the defendants should be left to implication, and the incidental matters minutely provided for." Every argument used in that judgment is applicable to the present case. If such an important stipulation as this had been intended, it never would have been left to inference and implication. [COCKBURN, C. J.—It must have been contemplated that *somebody* would obtain the required assent.] It may have been expected: but is it covenanted? *Aspdin v. Austin*, 5 Q. B. 671 (E. C. L. R. vol. 48), 1 D. & M. 515, and *James v. Cochrane*, 7 Exch. 170,†(a) are also authorities to show that the court cannot infer a covenant unless the words used evidence a clear and unmistakable intention in the parties to make a covenant. The cases cited on the other side are all in the defendants' favour, as far as they go. *Porcher v. Gardner* was disposed of by the remarks that fell from the court. In *Wood v. The Copper-Miners Coompany*, there was an express agreement upon which the action was founded. In *Harrison v. The Great Northern Railway Company*, the language used was such that the court could not do otherwise than infer that the company intended to contract for the required number of sleepers. And in *Aulton v. Atkins*, they declined to draw such an inference from language far stronger than that which is found here. [The court here called on

C. Pollock to reply.—*Rashleigh v. The South Eastern Railway Company* and *Aspdin v. Austin* proceeded upon the rule "Expressum facit cessare tacitum." In *both those cases the deeds were carefully [*667 drawn; whereas, it is impossible to conceive anything more loose than the agreement now in question. The last-mentioned case is commented upon by Erle, J., in the House of Lords, in *Emmens v. Elderton*, 13 C. B. 495 (E. C. L. R. vol. 76),(a) where it is put upon its true ground, viz. that it never could have been contemplated that the defendant should enter into an engagement to continue to carry on his business merely for the purpose of employing a workman. Here, the parties contemplate and provide for the execution of a more formal instrument: and it would hardly be asking the court too much to call upon them as a court of equity to carry out the intention of the parties in that respect.

COCKBURN, C. J.—It appears to me that there must be judgment for the defendants upon the demurrer to the second breach of the declaration in this case. It is true, that, according to the authorities which have been cited, where it is ambiguous on the face of a deed, by which of the parties a certain thing is to be done which the deed provides

(a) Affirmed in error, 8 Exch. 556.†

(b) And see *Elderton v. Emmens*, 4 C. B. 479, 498 (E. C. L. R. vol. 56), 6 C. B. 160 (E. C. L. R. vol. 60).

shall be done, the court will endeavour to ascertain from the general scope and tenor of the instrument upon whom is cast the duty of performing it. So, where a covenant may be implied from the general provisions of the deed, though there be no express provision on the subject, the court will give effect to the implied covenant. But the difficulty here is, that, there being no express covenant by the defendants to do that the omission of which is complained of, none arises by implication so clear that we can give effect to it. The corporation of Harwich by the memorandum of agreement in question agree to let to *668] the plaintiff the making, constructing, and *completing of certain works which were authorized to be made under The Harwich Improvement Quays and Pier Act, 1851, according to certain plans and specifications; and they agree to pay to the plaintiff, his executors, &c., all and every sum and sums of money which might thereafter become due and payable to him by virtue of those presents, and in manner set forth in said specification, and to carry out and perform all and every the provisions and stipulations provided in the specification to be carried out and performed. The plaintiff, the contractor, also thereby agrees with the corporation to take the work and to complete the same in manner set forth in the specification, and for the sums and subject to the provisions thereafter mentioned, viz. certain works described as "the first portion" of the said works, for the sum of 7318*l*. The agreement then goes on to provide that the plaintiff shall well and faithfully construct and execute "the second portion" of the said works, as described and laid down in the specification and plans, for 4987*l*, subject to the following provisions, that is to say, amongst others, that the assent of the commissioners of woods and forests shall be given to the corporation to carry out the said last-mentioned works so far as the same might affect the property or rights of the crown, and that the approbation of the lords of the treasury shall be given to the corporation to raise the money to pay for the same. It has been insisted, on the part of the plaintiff, that these provisions relate to matters which are to be accomplished by the corporation, the defendants. Now, the first observation which arises upon that, is, that the proviso for the assent of the commissioners of the woods and forests attaches itself to the covenant on the part of the plaintiff for the performance of the works, and by ordinary intendment would operate a qualification of his *669] covenant. But, assuming *that the proviso applies not merely to the plaintiff's covenant, but also to the covenants on the part of the corporation,—which I consider to be at best extremely doubtful,—then, there being a total absence of any express covenant on the part of either to obtain, in the one case the assent of the commissioners of woods and forests, and in the other the approbation of the lords of the treasury, it would seem that the parties have entered into the contract upon the mere assumption that these contingencies would come to

pass, and this assent and approbation be given. If that be so, the case comes very much within the principle of *Rashleigh v. The South Eastern Railway Company*, 10 C. B. 612 (E. C. L. R. vol. 70), where Maule, J., refers the form of the contract to an expectation of the parties that certain things which were contemplated would actually be done, and providing for what was to happen upon that assumption. But the court there held that no implied contract arose on the part of the defendants to do the thing in question. That seems to me to be very applicable to the present case. The parties have entered into a contract to do certain things, upon the assumption that certain necessary assents would first be obtained: but there is no provision, express or implied, to show that either of them took upon themselves the accomplishment of that preliminary step. That being so, it is not competent to the court to make a contract for the parties which they have not thought fit to make for themselves, or to import a covenant which does not arise by fair and necessary implication from the language they have used.

CRESSWELL, J.—I am of the same opinion. The parties have not introduced into their contract words which are sufficient to lead the court to infer that the defendants meant to covenant to obtain the assent and approbation required. The parties may possibly have *con- [670 templated that they would be given; but I find nothing in the agreement to show that the defendants intended to bind themselves to obtain them.

WILLIAMS, J.—I entirely concur in the opinions expressed by my Lord and my Brother Cresswell, and in the reasons assigned by them for holding the defendants entitled to judgment.

WILLES, J.—I must confess I had entertained some doubt in the course of the argument. But, upon looking closely into the agreement, I am unable to find therein any such covenant as the plaintiff's counsel contended for. I therefore agree that the defendants are entitled to judgment on the demurrer to the second breach in the declaration.

Judgment for the defendants.

C. Pollock.—The plaintiff will have judgment on the demurrer to the second plea.

Lush.—The defendants must have judgment on the demurrer to the replication to the fifth plea.

COCKBURN, C. J.—Probably, if the plaintiff consents to go no further upon the judgment, the fifth plea and the replication and demurrer thereon, may be struck out.

***671]** ***MOOR v. ROBERTS and Another.** *June 8.*

The court will not allow interrogatories (under the 17 & 18 Vict. c. 125, s. 51) the tendency of which is to discover how the plaintiff intends to shape his case, without furthering any case which the defendant has to set up.

Neither will interrogatories be allowed for the purpose of contradicting a written document.

THIS was an action against the defendants for breach of an undertaking to pay any deficiency which might arise on the sale of certain premises.

The declaration stated that one William Kirby was desirous of borrowing the sum of 1200*l.* upon mortgage of certain land, with the houses, messuages, and buildings thereon erected, and known as Nos. 12, 13, 14, 15, Russell Terrace, Holland Road, in the county of Surrey, and it was proposed and intended that interest should be payable on the said principal sum of 1200*l.* at the rate of, to wit, 5*l.* per cent. per annum, and that the mortgage-deed to be executed should express that such interest should be payable, and should also contain all necessary and usual powers of sale upon default; that thereupon, in consideration that the plaintiff and one George Mallows, since deceased, at the request of the defendants, would advance to the said W. Kirby the said sum of 1200*l.* upon such mortgage as aforesaid, the defendants undertook and promised the plaintiff and the said G. Mallows, that if, after any sale of the said premises so to be mortgaged duly made under the said powers of sale to be contained in the said mortgage-deed, the purchase-money should not be sufficient to satisfy the aforesaid sum of 1200*l.*, and all interest, costs, charges, and expenses which might be then due in respect of the said mortgage, they would immediately thereafter make good and pay to the plaintiff and the said G. Mallows such deficiency, whether the same should be occasioned by any defect in the title to the said premises, or otherwise howsoever: Averment, that the

***672]** plaintiff and the said G. Mallows did accordingly *advance to the said W. Kirby the said sum of 1200*l.* as aforesaid, on mortgage of the said premises, and that a mortgage-deed containing, among other things, a provision as to the payment of such interest as aforesaid, and also such power of sale as aforesaid, was duly executed and delivered by the said W. Kirby to him the plaintiff and the said G. Mallows, and that afterwards default was made by the said W. Kirby, to wit, in not paying the said principal sum and interest, according to the terms of the said mortgage-deed, whereby the said powers of sale became exercisable, and were thereupon duly exercised by the plaintiff, who had survived the said G. Mallows, accordingly, and the said premises included in the said mortgage and powers of sale were duly and properly sold in virtue thereof; and that, upon the said sale, the purchase-money of the said property was not sufficient to satisfy the said sum of 1200*l.* and a further sum of 250*l.* then due in respect of the said

mortgage for interest, costs, charges, and expenses, and that there was a deficiency thereon to the amount of 800*l.*; and that the plaintiff and the said G. Mallows, before his death, and the plaintiff since the death of the said G. Mallows, respectively, did all things, and all things were done and happened, to entitle him the plaintiff to have the said sum of 800*l.* made good and paid to him, as the survivor of the said G. Mallows, but that the defendants had not paid the same, &c.

The defendants, on the 27th of May, pursuant to an order of Crowder, J., of the 26th, pleaded,—first, that they did not undertake or promise in manner and form as in the declaration alleged,—secondly, that it was not proposed and intended as in the declaration alleged,—thirdly, that the plaintiff and the said G. Mallows did not advance to the said W. Kirby the said sum of 1200*l.* as in the declaration alleged,—fourthly, that a *mortgage-deed was not executed and delivered as in the declaration alleged,—fifthly, that the said powers of [*673 sale did not become exercisable, nor were they exercised, as in the declaration alleged,—sixthly, that the said premises were not sold as alleged,—seventhly, that there was not a deficiency upon the said sale, as in the declaration alleged.

The defendants had previously, viz., on the 25th of May, taken out a summons calling on the plaintiff to show cause why they should not be at liberty to deliver to him the following interrogatories, pursuant to the 51st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125:—

“1. Are you the plaintiff in this action, and is the same brought with your authority and on your behalf? and when and whom did you instruct to bring the same?

“2. Did you and George Mallows (since deceased) advance the 1200*l.* alleged to be advanced by you and George Mallows to William Kirby? and did you advance the same out of your own moneys or how otherwise? and when and how did you pay the same?

“3. Were you not as a banker, or was not your firm as bankers or otherwise, or was either of you, in the habit of lending to one F. H., of &c., various sums of money? and was not the alleged 1200*l.* stated to be advanced to William Kirby part of such sums lent to the said F. H. by you? and were not your names made use of in trust for him? and are you or were you not guarantied by the said F. H.? State fully.

“4. Was not the said F. H. in the habit of putting out money on mortgage or by way of loan for you and the said G. Mallows, or one of you, on his own guarantee, and at his discretion? and was not the said 1200*l.* so advanced by you and the said G. Mallows in that manner, or how otherwise? State fully.

“5. Had you and the said G. Mallows, or either of *you, any interest whatever in the said mortgage-debt and premises, beyond [*674 that of permitting your names to be used nominally or as a trustee for

the said F. H. or any other party, or whom? or what interest had you and have you therein? State fully.

"6. Have you not since the date of the alleged mortgage of the 15th of January, 1847, aforesaid, assigned all your right, title, and interest in the said mortgage-debt and interest? If so, to whom and when did you assign the same? State fully.

"7. Have you not been released from all claim in respect of the said mortgage-debt and premises? When was such release executed, and by whom given? State fully.

"8. Was not the guarantee mentioned in the declaration intended, according to the true intent and meaning of the parties thereto, to have continued only till such time as certain buildings should be completed on the said land in the declaration mentioned? And were not the said buildings so completed several years since? State when they were so completed.

"9. Was it not the intention of the parties to the said guarantee that the said sum of 1200*l.* should be repaid at a period not exceeding three years after the advance thereof, and that the said guarantee should only remain in force during such period of three years? And has not the said period of three years long since expired? and when?

"10. Did you, and when and how, authorize a sale of the said mortgaged premises? and, if so, what reserved price did you place thereon? When did the sale take place? By and to whom, and in what manner? And what was the amount of the purchase-money? And has the same, or what part thereof, been, and when, paid to you?

*675] "11. What is the balance of the principal money *due to you? And how and in what manner is it made out? How much for interest, and how much for costs, charges, and expenses? And when and to whom did you pay the same costs, charges, and expenses?

"12. Is not the contract for the sale of the said premises still depending and incomplete, and subject to further negotiation and inquiry? And is such contract of sale in writing? And how, when, and between what parties was the same made? And in whose possession is the same?"

Upon the hearing of the summons on the 26th of May, the learned judge made an order disallowing the interrogatories, with costs.

Rockfort Clarke, on a former day in this term, obtained a rule calling upon the plaintiff to show cause why that order should not be rescinded, and why the defendants should not be at liberty to deliver the said interrogatories, &c.

Griffiths now showed cause.—The proposed interrogatories are not such as ought to be allowed. The rule on this subject is well laid down by Lord Campbell, in *Whateley v. Crowter*, 5 Ellis & B. 709 (E. C. L. R. vol. 85), where he says—"Under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 51, a party may administer inter-

rogatories for the purpose of obtaining a discovery, if the interrogatories are such that the answers may be reasonably expected to discover matters which will advance the case of the interrogating party, though the answers may also disclose what is the case of the interrogated party. The object of the enactment was, to obviate what was a scandal to the law, viz., the necessity of commencing a fresh suit in a court of equity for the purpose of obtaining discovery in aid of an action at law. To effectuate this, it is enacted, that, by leave *of the court or a judge, a party to a suit may deliver 'interrogatories [*676 in writing upon any matter as to which discovery may be sought.' What is the interpretation to be put upon that? I think it is too wide an interpretation to say, as seems to have been said by Alderson, B., in the case cited in the Exchequer,(a) that every question may be asked on interrogatories which might be asked if the party were a witness at the trial. I think the interrogatories must be confined to matters which might be discovered by a bill of discovery in equity. I adopt the rule in the very terms used by Sir James Wigram:(b) 'The right of a plaintiff in equity to the benefit of the defendant's oath, is limited to a discovery of such material facts as relate to the plaintiff's case,—and does not extend to a discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case.' *You may inquire into all that is material to your own case*, though it should be in common with that of your adversary; *but you may not inquire into what is exclusively his case.*" Again, in *Edwards v. Wakefield*, 6 Ellis & B. 462 (E. C. L. R. vol. 88), the same learned judge says: "This was an action of trover by the assignees of a bankrupt, to recover property alleged to form part of the bankrupt's estate: and the proposed interrogatories were for the purpose of compelling the plaintiffs to state upon oath what act or acts of bankruptcy they intended to rely upon in support of the title of the assignees. We think that the application is not authorized by the enactment in question. We are disposed to think that the section now under our consideration is intended to apply to cases only where the matters inquired into would be evidence in the cause, and *that it was [*677 not intended thereby to give one party the power of asking the other how he intends to shape his case. Such an inquiry is a mode of requiring particulars on oath without the party being obliged afterwards to confine himself to the particulars. When the justice of the case requires such particulars to be given, the courts have generally the means of compelling them to be given under such provisions as are reasonable. We think that we ought, at all events, to hold that the discovery, under the 51st section, is limited, by the words 'upon any matter as to which discovery may be sought,' to the cases where a dis-

(a) *Osborne v. The London Dock Company*, 10 Exch. 698, 702.†

(b) *Wigram on Discovery*, 2d edit. 261.

covery would be given in equity : and we think that the proposed questions clearly fall within the rule that a party is not to make a fishing application as to the manner in which his adversary intends to shape his case, and as to the evidence by which he intends to support it." "We were much pressed with the recent case of *Flitcroft v. Fletcher*, 11 Exch. 543.† If the court there meant to decide that the defendant may always ask the plaintiff to declare on oath how he means to shape his case, we are not prepared to assent to it; and we should not feel ourselves bound by a decision of this nature, to the same extent as where a decision can be reviewed on error, even if the case were precisely in point." The interrogatories here proposed are open to all the objections above suggested : they are either inquiries as to matters not relevant to the cause, or directed to information which the defendant has by the ordinary practice of the court other means of obtaining, or to that which is exclusively the plaintiff's case. The second, tenth, and twelfth interrogatories relate exclusively to matters which the plaintiff would be bound to prove in support of his case : the third, fourth, fifth, seventh, and ninth have no application to any of the *678] issues in the cause : the sixth can only be for the *purpose of founding an application for security for costs : the eighth goes only to a denial of the guarantee in terms : and the eleventh is addressed to the damages, which do not form a proper matter for interrogatories.

R. Clarke, in support of his rule.—In *Edwards v. Wakefield*, 6 Ellis & B. 462 (E. C. L. R. vol. 88), the whole of the proposed interrogatories tended solely to an inquiry into the plaintiff's case. But, in *Whateley v. Crowter*, 5 Ellis & B. 709 (E. C. L. R. vol. 85), the court of Queen's Bench distinctly recognise the right of a party to administer interrogatories in support of his own case, even though the answers may at the same time disclose the case of his adversary. It is enough, according to the case of *Croomes v. Morrison*, 5 Ellis & B. 984 (E. C. L. R. vol. 85), if the court are satisfied that the interrogatories are pertinent. [COCKBURN, C. J.—Can you be permitted to ask the plaintiff what is the real nature of his case?] If any of the interrogatories proposed are such as the plaintiff ought not to answer, he may decline to answer them on that ground. [COCKBURN, C. J.—If this had been an application to a court of equity for a discovery, would they have granted what you now ask?] The true rule in the court of equity undoubtedly is as stated in the passage cited by Lord Campbell from *Wigram on Discovery*. [COCKBURN, C. J.—Is it not limited to this,—that, having a case, you seek to extract from your adversary the means of proving it? Here, you are seeking to discover what is the plaintiff's case. What is the case which you wish to establish?] That the defendants did not enter into the contract stated in the declaration. [CRESSWELL, J.—That is in writing: it will speak for itself.] The

defendants traverse the alleged intention: the guarantee was not intended to continue beyond three years; and all that it contemplated is accomplished. [COCKBURN, C. J.—In whose breast is that?] In the plaintiff's as well *as in that of the defendants. The defendants want to show that a third party, and not the plaintiff, was really the principal in the transaction. The rule laid down in the cases cited only goes to preclude a defendant from putting to the plaintiff interrogatories as to something which is *exclusively* part of his case. [*679]

COCKBURN, C. J.—I am of opinion that this rule should be discharged. The obvious intention of the 51st section of the Common Law Procedure Act, 1854, was, to supersede the necessity of recourse being had in all cases to a court of equity for the purpose of aiding by discovery the proceedings in an action at common law, and to give the courts of common law power to afford the same sort of assistance to suitors there. But we must consider what was the object of the act; and we shall find it to have been this,—that, where either party has a case, but the materials for proving it are not in his own possession or under his own control, but in the possession of his adversary, he should be enabled to interrogate his adversary in order to establish his own case. But the statute clearly was not meant to apply so as to enable one party by means of interrogatories to discover how the other intends to shape his own case, and to see whether there are any defects in it which he may avail himself of. The defendants here do not come with any affidavits showing how the proposed interrogatories will further their defence to the action: but they come with a series of questions the manifest object of which is to probe the case of the plaintiff, without in any degree advancing that which they themselves propose to set up.

CRESSWELL, J.—I am of the same opinion. There is undoubtedly considerable difficulty in drawing the line in each case between what interrogatories ought and *what ought not to be allowed. But it seems to me that all those which are proposed in this case fall within one or other of three classes,—first, where the defendant is seeking to discover the plaintiff's case, which cannot be allowed,—secondly, where the interrogatories are what are called fishing interrogatories, thrown out for the chance of getting hold of some fact or admission which might help the defendant's case,—thirdly, where the proposed interrogatories have a tendency to contradict a written document. Upon the whole, I think the decision of my Brother Crowder was right, and that this rule must be discharged. [*680]

WILLIAMS, J.—I am entirely of the same opinion. This is in substance an attempt on the part of the defendants by indirect means to obtain a knowledge of what the plaintiff intends to rely on in support of his case. To allow that would be to make the statute an instrument of oppression to the suitor.

WILLES, J., concurred.

Rule discharged, with costs.

*681] *GORRISEN and Others v. PERRIN and Others. *June 11.*

A. contracted to sell to B. 1170 "bales" of gambier, "now on passage from Singapore, and expected to arrive in London, viz. per Ravenscraig, 805 bales, per Lady Agnes Duff, 365 bales :"—Held, a warranty that the goods were *then on passage*.

Held, also, that evidence was admissible to show that, by the usage of the trade, a "bale" of gambier was understood to mean a package of a particular description; and that the contract was not satisfied by a tender of packages of a totally different size and description.

Quære, as to the extent of the vendor's liability on a sale of goods "expected to arrive" by a particular ship, where goods of the description contracted to be sold do arrive, but are consigned to a third party?

THIS was an action for the breach of a contract for the sale by the defendants to the plaintiffs of a quantity of gambier.

The first count of the declaration stated, that, by an agreement made between the plaintiffs and the defendants, it was agreed that the plaintiffs should buy of the defendants, and the defendants should sell and deliver to the plaintiffs, 1170 bales of gambier, *which the defendants thereby warranted to be then on passage from Singapore, and expected to arrive in London*, that is to say, 805 bales by a vessel called the Ravenscraig, and 365 bales by a vessel called the Lady Agnes Duff, at certain prices then agreed upon between the plaintiffs and defendants; and it was thereby further agreed, that, if either or both of the said vessels should be lost, the said agreement should be void for the quantity so lost: Averment, that the plaintiffs had done all things, and that all things had happened, and all times had elapsed, necessary to entitle them to a performance of the said warranty of the defendants, and to maintain this action for non-performance thereof; and that neither of the said vessels was lost: Breach, that the defendants had broken their contract, in this, to wit, that 1170 bales of gambier were not, nor was any part thereof, at the time of making the said agreement, on passage from Singapore, within the true meaning of their said contract; whereby the plaintiffs had lost and been deprived of the said gambier, and of the profit and advantage they would have derived from having the same.

*682] *Second count,—that, by agreement between the plaintiffs and defendants, it was agreed that the plaintiffs should buy from the defendants, and the defendants should sell and deliver to the plaintiffs, 1170 bales of gambier *then on passage from Singapore, and expected to arrive at London*, that is to say, 805 bales by a vessel called the Ravenscraig, and 365 bales by a vessel called the Lady Agnes Duff, at certain prices then agreed upon between the plaintiffs and the defendants; and it was thereby further agreed, that, if either or both of the said vessels should be lost, the said agreement should be void for the quantity so lost: Averment, that the plaintiffs had done all things, and all things had happened, and all times had elapsed, necessary to entitle them to a delivery of the said gambier by the defendants, and to see

the defendants for non-delivery thereof; and that neither of the said vessels was lost; but that the said specified quantities of gambier arrived at London by the said vessels respectively: Breach, that the defendants did not nor would at any time deliver to the plaintiffs the said 1170 bales of gambier, according to the true intent and meaning of the said contract, but tendered and offered to deliver to the plaintiffs in lieu thereof 1170 small packages of gambier, being a much less quantity of gambier than the 1170 bales of gambier so agreed to be delivered by the defendants to the plaintiffs; and the plaintiffs had thereby been deprived of the said gambier, and of the profit and advantage they would have derived from having the same: Claim, 1000*l*.

The defendants pleaded,—first, that they did not promise as alleged,—secondly, to the first count, that the bales of gambier in the contract mentioned were at the time of making the contract on passage from Singapore,—thirdly, to the second count, that the specified quantities of gambier did not arrive at London by the *said vessels or [*688 either of them respectively,—fourthly, to the second count, that the defendants were at all times ready and willing to deliver to the plaintiffs all the said gambier which did arrive in the said vessels, or either of them, and that the plaintiffs were not ready nor willing to accept the same,—fifthly, to the second count, that the defendants did deliver to the plaintiffs the said gambier, according to the true meaning of the said contract. Issue thereon.

The cause was tried before Cockburn, C. J., at the sittings in London after last Michaelmas Term. The facts were as follows:—On the 5th of February, 1856, one Field, a colonial broker, was instructed by the plaintiffs to procure for them about 100 tons of gambier. Field informed them that he had two shipments to dispose of, and they agreed to take them; and, accordingly, Field on the same day sent them the following bought-note:—

“ London, 5th February, 1856.

“ Messrs. Gorrisen, Huffel & Co.

“ Gentlemen,—I have this day bought by your order and for your account, 1170 bales gambier, now on passage from Singapore, and expected to arrive at London, viz.

“ Per Ravenscraig . . . 805 bales

“ Per Lady Agnes Duff, . . . 365 “

1170 bales, at 15*s*. 6*d*. per cwt.,

sound.

“ For damages, if any, an allowance to be made of

“ 1*s*. per cwt. 1st class, damaged or heated,

“ 2*s*. “ 2*d* “ “

“ 3*s*. “ 3*d* “ “

"Should either or both vessels be lost, this contract void for quantity so lost.

*[684] "Usual conditions. Prompt, three months from last day landing. Deposit, 15 per cent.

"Brokerage, $\frac{1}{2}$ per cent.

"W. FIELD, Broker."

A sold-note in similar terms was on the same day sent by the broker to the defendants.

The Ravenscraig arrived in London on the 24th of March, having on board 805 packages of gambier, consigned to the defendants, and five other parcels containing in the aggregate 2382 bales consigned to other parties. The Agnes Duff arrived on the 25th of April, having on board 365 packages of gambier consigned to the defendants, and 1693 bales consigned to other parties.

The 805 packages by the Ravenscraig, and the 365 by the Lady Agnes Duff, turned out to be of less than a third of the size and weight of the packages usually known in the market as "bales" of gambier, which, it was proved, average about 2 cwt. each.

All the other packages brought by the two vessels were in fact ordinary bales. The plaintiffs thereupon declined to receive the gambier as a performance of the contract, but by arrangement they afterwards took it without prejudice.

Evidence was offered on the part of the plaintiffs, that the term "bale," as applied to gambier, was universally understood to mean a compressed bale of the average weight of 2 cwt. This was objected to on the part of the defendants, on the ground that it was in effect varying by parol evidence a written contract, which was not ambiguous upon the face of it, and which related to certain specific packages which were identified therein. The evidence was received.

On the part of the plaintiffs it was submitted, that the contract amounted to a warranty that 1170 bales of the description commonly *known in the market as *bales of gambier, were on their passage from Singapore in the vessels named, and that that warranty [685] was broken; or, assuming the contract to be conditional on the arrival of the bales, the plaintiff was still entitled to recover, inasmuch as a sufficient number of bales did in point of fact arrive by the Ravenscraig and Lady Agnes Duff to satisfy the contract, though consigned to other parties.

For the defendants, it was insisted that the contract was conditional, depending upon the double contingency of the stipulated number of bales arriving by the vessels named, and coming consigned to the defendants.

The Lord Chief Justice left it to the jury to say whether the packages in question were "bales" in the ordinary acceptance of the term, and whether that term had by the usage of the gambier trade acquired

the signification contended for by the plaintiff, viz., that of a package compressed, and weighing upon an average 2 cwt.

The jury found that the packages were not "bales" in the ordinary acceptation of the term, and that the bale of gambier known in the trade was a package compressed and weighing 2 cwt. His Lordship thereupon directed a verdict to be entered for the plaintiffs, reserving leave to the defendants to move.

James Wilde, Q. C., in Hilary Term last, accordingly obtained a rule nisi to enter a verdict for the defendants on the first count of the declaration, on the grounds "that there was no warranty that the bales mentioned in the contract were the usual bales sold in London, and that the evidence was inadmissible; also that there was no warranty that at the time of the contract the bales were on their passage, and that the goods delivered were sufficient to fulfil the contract; and on the second count, on the ground that the defendants were not *bound to deliver any other bales than those which they did, and that the [*686 bales belonging to others which did arrive were not the bales contracted for;" or for a new trial, on the ground that the evidence as to the meaning of the word "bale" was inadmissible. He submitted that the words "now on passage from Singapore," were words of condition, and not of warranty; and he referred to *Hayward v. Scougall*, 2 Campb. 56, *Boyd v. Siffkin*, 2 Campb. 326, *Bold v. Rayner*, 1 M. & W. 343,† *Lovatt v. Hamilton*, 5 M. & W. 639,† *Stockdale v. Dunlop*, 6 M. & W. 224,† *Johnson v. Macdonald*, 9 M. & W. 600,† *Fischel v. Scott*, 15 C. B. 69 (E. C. L. R. vol. 80), and *Barker, App., Windle, Resp.*, 6 Ellis & B. 675 (E. C. L. R. vol. 88).

Byles, Serjt., and *Honyman*, in Easter Term, showed cause.—The first question is, whether the evidence of the understanding of the trade as to the meaning of the term "bale" was properly received. Upon that the current of authorities is tolerably clear. In the notes to *Wiglesworth v. Dallison* (Dougl. 201), in 1 Smith's Leading Cases, 453, 462, the rule is thus stated,—“With respect to commercial contracts, it has been long established that evidence of a *usage of trade* applicable to the contract, and which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the written contract is silent.” And this rule is not limited to contracts which are strictly of a mercantile character: thus, in *Smith v. Wilson*, 3 B. & Ad. 728 (E. C. L. R. vol. 23), evidence was received to show that by the custom of a particular district the words "1000 rabbits" meant "1200 rabbits." See the authorities also referred to in *Taylor on Evidence*, 2d edit. §§ 1061, 1062. In *Taylor v. Briggs*, 2 C. & P. 525 (E. C. L. R. vol. 12), where a controversy arose as to the meaning of the word "cotton in bales" in a charter-party, Abbott,

*687] *C. J., said: "If the word 'bale' had acquired a particular meaning in regard to the trade of Liverpool and Alexandria, I should consider that that meaning should apply in this case; but there should be distinct evidence that the word has that particular meaning." Here there *was* distinct evidence upon the subject. The contract is for 1170 bales of gambier. Would that be satisfied by the delivery of 1170 packages of any size or description? If not, evidence clearly must be admissible to show what the things are with respect to which the parties are contracting. [COCKBURN, C. J.—If the term "bale," as applied to gambier, has acquired in the particular trade a signification differing from its ordinary signification, evidence must be received on the subject, otherwise effect is not given to the contract.] It is difficult to perceive upon what foundation the objection to the evidence rests. Then, as to the construction of the contract. The declaration contains two counts: the first treats the statement in the contract that the bales were "then on passage from Singapore," as a warranty, alleging for breach that the 1170 bales of gambier were not at the time of making the agreement on passage from Singapore; and the second proceeds upon the assumption that the stipulated quantity of bales had arrived by the ships in question, and alleges for breach their non-delivery. Whatever be the construction, therefore, which the court put upon the contract, one or other of these counts must be supported; for, if the first is not made out, it is by reason of a fact which entitles the plaintiffs to a verdict upon the second count, viz., that the goods contracted for did arrive. [COCKBURN, C. J.—Do you contend, that, if a man contracts to sell you goods expected to arrive by such a ship, he is bound to deliver to you somebody else's goods?] Such seems to have been the impression of this court in *Fischel v. Scott*, 15 C. B. 69.

*688] [CRESSWELL, J.—*There was no *decision* in that case; the defendants elected to amend, though, as appears from the note at the end of the case, they ultimately declined to avail themselves of the leave to do so.] Assume, for the present, that the contract is confined to gambier the property of the defendants,—in order to establish their right to recover upon the first count, the plaintiffs must make out that the contract involves a warranty that the articles contracted for were "bales of gambier" in the sense found by the jury, and that they were then on passage from Singapore. [COCKBURN, C. J.—The argument on the other side, as to this part of the case, is, that the contract is conditional on the contingency of the ships' arrival each with the stipulated number of bales of gambier on board.] A contract for the sale of goods, "on arrival" (*Boyd v. Siffkin*, 2 Campb. 326), "to be shipped" or "to arrive" by a particular ship (*Splidt v. Heath*, 2 Campb. 57, n., *Lovatt v. Hamilton*, 5 M. & W. 639,† *Stockdale v. Dunlop*, 6 M. & W. 224,† *Johnson v. Macdonald*, 9 M. & W. 600†), or "that may be loaded" (*Hayward v. Scougall*, 2 Campb. 56), has been held to be sub-

ject to the double contingency of the arrival of the vessel named, and of the goods being on board. But no case has yet held the contract to be conditional where the words used are at all like those used in the present case,—“now on passage from Singapore, and expected to arrive in London per Ravenscraig and Lady Agnes Duff.” If these words do not amount to a warranty on the part of the seller that the goods were then on their passage from Singapore, it is impossible to conceive any words which would amount to a warranty. The introduction of “expected to arrive” cannot control the absolute and unconditional words by which they are preceded,—“now on passage from Singapore.” In *Ollive v. Booker*, 1 Exch. 416,† to an action for not loading a vessel in pursuance of the terms of a *charter-party, the defendant pleaded, [689 setting out the whole of the charter-party, which stated that it was agreed between the plaintiff, “original charterer of the good ship or vessel Dove, A. 1, of the measurement of 149 tons, or thereabouts, *now at sea, having sailed three weeks ago, or thereabouts,*” and the defendant, that the ship, being tight, staunch, &c., should proceed to Marseilles (after having delivered her cargo at Genoa), and there load certain goods of the defendant, and therewith proceed to a safe port in the United Kingdom, calling at Cork or Falmouth, for a certain rate of freight, &c. The plea then averred, that time was an essential and material part of the contract; that the probable situation of the vessel with reference to the date of her sailing, and the object of her voyage, was also an essential and material part of the contract; and that, in point of fact, at the time of the making of the charter-party, the vessel had not sailed three weeks before, but, on the contrary, had sailed at a materially and unreasonably later time, to wit, one week later, of which the defendant had no notice or knowledge, for which cause the defendant neglected and refused to load the vessel. It was held that the time at which the vessel sailed was material, and that the statement in the charter-party amounted to a warranty. “The main question,” says Parke, B., “is, whether the allegation in the charter-party, of the vessel being ‘now at sea, having sailed three weeks ago,’ is a warranty or a representation. In the construction of agreements, as in the case of contracts under seal, we should endeavour to discover the intention of the parties. Here it is stated that the vessel was now at sea, having sailed three weeks: and, if time is of the essence of the contract, no doubt it is a warranty, and not a representation. Such also is the case in policies of insurance. It appears to me that it is a warranty, and not a representation, that the *vessel had sailed three weeks. It [690 is, therefore, a condition precedent. The rule depends upon each particular contract, and here time was of the essence of the contract, as much so as the statement that she was a sound vessel.” So, here, the statement that the goods were then on passage was of the very essence of the contract, and could not have been intended as mere

words of representation or description. In *Shepherd v. Kain*, 5 B. & Ald. 240 (E. C. L. R. vol. 7), where an advertisement for the sale of a ship described her as "a copper-fastened vessel," adding that the vessel was to be taken with all faults, without any allowance for any defects whatsoever, and it appeared that she was only partially copper-fastened,—it was held, that, notwithstanding the words "with all faults, &c.," the vendor was liable for the breach of the warranty. In giving judgment, the court there say: "The meaning of the advertisement must be, that the seller will not be responsible for any faults which a copper-fastened ship may have. Suppose a silver service sold 'with all faults,' and it turns out to be plated; can there be any doubt that the vendor would be liable? 'With all faults' must mean, with all faults which it may have consistently with its being the thing described. Here, the ship was not a copper-fastened ship at all." (a) In *Barker v. Windle*, 6 Ellis & B. 675 (E. C. L. R. vol. 88), the statement in the charter-party that the ship was A. 1, was mere matter of description, or, as was said in *Hurst v. Osborne*, 18 C. B. 144 (E. C. L. R. vol. 86), a warranty of her then state only. In *Allan v. Lake*, 18 Q. B. 560 (E. C. L. R. vol. 83), the defendant, by his agent, sold the plaintiffs a parcel of turnip-seed, and gave the following sold-note:—"Mr. T. C. R. (defendant's agent). Sold Messrs. B. & Co. (plaintiffs), for Mr. C. Lake (defendant), 14 quarters Skirving's Swedes, at 17s. per bushel:" and it was held *that this description of the seed in

*691] the sold-note amounted to a warranty that it was Skirving's Swedes." So, in *Nichol v. Godts*, 10 Exch. 191,† it was held that an agreement for the sale and delivery of certain oil, described as "foreign refined rape-oil, warranted only equal to samples," is not complied with by the tender of oil which is not "foreign refined rape-oil," although it be equal to the quality of the samples. Pollock, C. B., there says: "The important words in the contract are these: 'foreign refined rape-oil, warranted only equal to samples.' My Brother Parke told the jury, that, according to the true construction of this contract, not only the article delivered must agree with the samples in quality, which was the meaning of the words 'warranted only equal to samples,' but also that the oil ought to agree with the description of it in the contract as to its character. It was contended by Mr. Watson that the expression 'warranted only equal to samples' excluded every other description of warranty; and, provided the oil delivered was equal to the samples, that was sufficient to render the defendant liable to take it and pay for it, although, in point of fact, it did not answer the description of being foreign refined rape-oil. The effect of that argument is, to render the words 'foreign refined rape-oil' of no avail. Such a proposition cannot be supported. I think the direction was perfectly correct; for, as my Brother Platt observed, it could not be contended

(a) But see *Taylor v. Bullen*, 5 Exch. 779.†

that, if it had turned out that the oil was whale-oil, the contract would have been performed." That affords a decisive answer to any argument that may be founded upon the words "expected to arrive," in this case. [CRESSWELL, J.—Suppose the defendants had tendered, as a fulfilment of their contract, 1170 packages of gambier of 2 cwt. each; but not properly packed,—could the plaintiffs have objected to receive them? The argument must go that length upon this part of the case.]

*If the packages were such as not to answer the description of "bales of gambier," it is submitted that they might be rejected. [*692

The description on the sale of goods is an express warranty.(a) Should the court be of opinion that the contract does not amount to a warranty that the goods contracted to be sold were actually shipped, the plaintiffs are still entitled to recover upon the second count. The Ravenscraig and Lady Agnes Duff arrived in London, with the stipulated quantity of bales of gambier on board, although not belonging to the defendants. There is nothing illegal in a man contracting to sell goods which he has not: *Hibblewhite v. M'Morine*, 5 M. & W. 462.† A man may lawfully contract to sell to another the horse that shall win the next Derby.(b) [COCKBURN, C. J.—We must put a reasonable construction upon the contract: it cannot be assumed that the defendants meant to sell somebody else's goods. The case of *Fischel v. Scott*, 15 C. B. 69 (E. C. L. R. vol. 80), though not precisely a decision upon the point, contains *a pretty strong intimation of the opinions of two mem-

bers of the court. The contract there was for "100 hhds. of [*693

Gingelly oil *expected to arrive* by the ship *Resolute* from Madras:" the *Resolute* arrived with 100 hhds. of Gingelly oil on board, but it turned out that 34 hhds. only were consigned to or under the power or control of the seller. Maule, J., said: "The oil is described pretty clearly: the question is, whether the oil which came was oil 'expected to arrive per *Resolute*.'" And Jervis, C. J., said: "The oil which was expected did arrive. The defendant expected it to come consigned to him; but it turned out that it was consigned to some one else." In *Vernede v. Weber*, 1 Hurlst. & N. 311,† special words were introduced into the contract to avoid this difficulty,—“provided the same be shipped for seller's account.” Upon the whole, it is submitted that there was here a warranty on the part of the seller that the goods were actually shipped

(a) See *Simond v. Braddon*, ante, p. 324.

(b) In Pothier on Obligations, Vol. I., P. 1, c. 1, §. 4, § 2, p. 78, it is said: "Even things which do not belong to the debtor, but to another person, may be the object of an obligation, as he is thereby obliged to purchase or otherwise procure them in order to fulfil his engagement; and, if the real owner will not part with them, the debtor cannot insist that he is discharged from his obligation under the pretext that no man can be obliged to perform an impossibility. For, this excuse is only valid in case of an absolute impossibility; but, where the thing is possible in itself, the obligation subsists, notwithstanding it is beyond the means of the person obliged to accomplish it; and he is answerable for the damages occasioned by the non-performance of his engagement. The thing being possible in its nature, is sufficient to induce the creditor to rely upon the performance of the promise. The fault is imputable to the debtor, for not having duly examined whether it was in his power to accomplish what he promised or not."

and on passage, or, if there was no warranty, but the contract was conditional only, that the condition has been fulfilled by the arrival of the vessel with a sufficient quantity of bales of gambier on board to answer the contract, and that the plaintiffs were entitled to have them delivered to them.

James Wilde, Q. C., and Blackburn, in support of the rule.—The substantial question here is that which arises upon the meaning of the contract. Three constructions are proposed: it may mean compressed bales, which averaged 2 cwt. each, and which were on board the two vessels named, but were consigned to strangers,—or compressed bales of 2 cwt. which never were on passage at all, and about which the vendors are supposed to warrant that they were on passage,—or the bales or packages which were on board, and which did belong to the vendors. If the court are to choose between *these three, inde-
 *694] pendent of authority, there can be little doubt that they would conclude that the vendors intended to sell and the vendees to buy that which the former had to sell. 1. What reason is there for presuming that the parties intended to deal with goods in which the vendors had no interest? *Fischel v. Scott*, 15 C. B. 69 (E. C. L. R. vol. 80), is supposed to be an authority against the defendants upon this point. There, the plaintiff declared, not setting out a mercantile contract, but merely alleging that it was agreed between himself and the defendants to buy of them certain oil “expected to arrive from Madras” by a particular vessel, that the oil did arrive, and the defendants refused to deliver it: the defendants did not by their plea answer, as they should have done, that the oil which was expected belonged to them, but did not arrive; but they simply denied that the oil which did arrive belonged to them: and the court in effect say that the plea admits that the oil which was the subject of the contract did arrive, but seeks to exonerate the defendants from liability to deliver it, by saying that it was not their property. There was no contract before the court upon which to put a construction.(a) This, therefore, is a totally different case from that. Here, the exact number of packages contracted to be sold did arrive by the vessels named,—805 by the *Ravensraig*, and 365 by the *Lady Agnes Duff*, the whole of which were consigned to the person from whom the defendants bought: and the court are asked to hold, that, under these circumstances, the parties were con-
 *695] tracting about the bales of some other *people, of which there were enough on board of either vessel to satisfy the contract, but it was not shown that a sufficient quantity belonged to any one consignee. *Hayward v. Scougall*, 2 Campb. 56, is precisely in point.

(a) The learned counsel stated that he had been informed by Mr. Tomlinson, who argued that case, that the reason why the defendants declined to avail themselves of the leave to amend, was, that the matter in dispute was of such small value that it was thought not worth while further to contest it.

The defendants sold to the plaintiffs all the hemp that might be shipped on board certain vessels at Riga, not exceeding 300 tons, by Messrs. Schmidts & Co., the agents of the concern: the Messrs. Schmidts shipped on board these vessels only 71 tons of hemp on account of the defendants, but upwards of 300 tons on account of other persons: and it was held that the contract must be confined to such hemp as the Schmidts should ship as agents to the defendants, and that the defendants were not answerable to the plaintiffs for more than the 71 tons. Lord Ellenborough said: "As all the hemp which the Schmidts were to ship at Riga was not to belong to the defendants, this renders it improbable that they should mean to sell what was not their own. In the case alluded to (*Splidt v. Heath*, 2 Campb. 57, n.), the party had agreed to ship and deliver a certain quantity of hemp; and, to be sure, nothing could excuse him from doing so. But here the defendants only sold what they supposed their agents would ship for them. No doubt they expected Schmidts & Co. to ship at least 300 tons of hemp on their account: but they were disappointed. They seem to have contemplated the possibility of this. They say, in substance, 'We will sell you all that our agents at Riga ship for us, to the amount of 300 tons. If they send us so much, you shall have it; if they send us none, we have sold none to you.' The words employed are by no means strong enough to intimate that they had undertaken to sell that which did not belong to them, and over which they had no control." 2. The contract in question is one of a class which is common in modern times, where the sale is of goods "to arrive," or "on arrival." With *the exception of *Fischel v. Scott*, this is the first case in which the words [696 used have been "expected to arrive." (a) It is a somewhat stronger expression than the others; and shows that the parties are dealing with a thing which they know something about. The word "expected" is not inserted with a view to the protection of the vendor in case the vessels should be lost; for, that contingency is expressly provided for. [COCKBURN, C. J.—The same words occur in the contract in *Johnson v. Macdonald*, 9 M. & W. 600;† and they were held not to have the effect of altering the contract, which was conditional on the double event of the arrival of the vessel *with the goods on board*. CRESSWELL, J.—My Brother Parke treats those words as superfluous; and so they are, if the contract is conditional.] It is submitted that the whole is

(a) See *Bold v. Rayner*, 1 M. & W. 343.† A broker gave the following bought and sold notes:—1. "We have this day bought for your use, from J. O. Bold, 100 tons dry palm-oil, at 31*l*. 10*s*. per ton, to be taken from the quay at landing weights, with customary allowances, &c., in cash at fourteen days from delivery, less 2½ per cent. discount: the above oil to be delivered from the Speedy or Charlotte, *expected to arrive* about November or December next." 2. "We have this day sold, for your use, payment in fourteen days, by cash, less 2½ per cent. discount, from delivery, 100 tons dry palm-oil, at 31*l*. 10*s*. per ton, ex Speedy and Charlotte, *to arrive*." It was held, that evidence of mercantile usage was admissible to explain all the variances between these notes, and that, being so explained, the variances were not material, and did not avoid the contract.

conditional here, as well as in that case. [CRESSWELL, J.—The words are, “expected to arrive in London:” does that import a condition that the goods shall arrive *in London?*] In *Lovatt v. Hamilton*, 5 M. & W. 639,† the contract was for goods “to arrive per Mansfield,” and it was held that their arrival in that vessel was a condition precedent, *697] and that the *vendors were not entitled to have goods brought in another vessel. So, here, if the goods came to Liverpool, the defendants would not be bound to deliver them. The words “now on passage,” it is submitted, do not amount to a warranty. They are really put in in order to protect the sellers. [COCKBURN, C. J.—Why are we to assume that those words are put in to protect the sellers, and not for the benefit of the buyers?] To make an affirmation at the time of sale a warranty, it must appear to have been so intended: see the notes to *Chandelor v. Lopus* (Cro. Jac. 4), 1 Smith’s Leading Cases, 4th edit. 140; *Budd v. Fairmaner*, 8 Bingh. 48 (E. C. L. R. vol. 21), 1 M. & Scott, 74 (E. C. L. R. vol. 24); *Jendwine v. Slade*, 2 Esp. N. P. C. 572; *Dunlop v. Waugh*, Peake’s N. P. C. 167; *Gwillim v. Daniell*, 2 C. M. & R. 61.† That the words here used are words of condition or description only, is fortified by the recent decisions as to the warranty of sea-worthiness in policy cases: see *Gibson v. Small*, 4 House of Lords Cases, 353, *Jenkins v. Heycock*, 8 Moore’s P. C. Cases, 351, *Michael v. Tredwin*, 17 C. B. 551 (E. C. L. R. vol. 84), and *Fawcus v. Sarsfield*, 6 Ellis & B. 192 (E. C. L. R. vol. 88).^(a) The words “the vessel to sail from England on or before” a given day, were, in *Glaholm v. Hays*, 2 Scott, N. R. 471, 2 M. & G. 257 (E. C. L. R. vol. 40), held to be a condition; but they have never been held to amount to a warranty. [COCKBURN, C. J.—If it be a condition precedent on the one side, it is a contract to be performed on the other.] No doubt, it may be both. [CRESSWELL, J.—According to the party who wishes to take advantage of it. CROWDER, J.—In *Ollive v. Booker*, 1 Exch. 416,† Parke, B., holds a statement in a charter-party of the vessel being “now at sea, having sailed three weeks ago,” to be a warranty, and not a representation, that the vessel had sailed three *698] weeks; and *therefore a condition precedent.] The word “warranty” is constantly used, though in truth it is only a condition.

3. The ground upon which the decision of the case must ultimately rest, is, that the parties were contracting for the purchase and sale of specific packages of gambier which had been shipped and were then on board the vessels named. The contract being for a specific thing, it is satisfied by the delivery of the article mentioned: *Chanter v. Hopkins*, 4 M. & W. 399;† *Parsons v. Sexton*, 4 C. B. 899 (E. C. L. R. vol. 56); *Ollivant v. Bayley*, 5 Q. B. 288 (E. C. L. R. vol. 48); *Gomperts v. Bartlett*, 2 Ellis & B. 849 (E. C. L. R. vol. 75); *Young v. Cole*, 3 N. C. 724 (E. C. L. R. vol. 32), 4 Scott, 489; *Gurney v. Womersley*,

^(a) And see *M’Swiney v. The Royal Exchange Assurance*, 14 Q. B. 634 (E. C. L. R. vol. 68).

4 Ellis & B. 133 (E. C. L. R. vol. 82); *Prideaux v. Bunnett*, 1 C. B. N. S. 613 (E. C. L. R. vol. 87). *Cur. adv. vult.*

COCKBURN, C. J., now delivered the judgment of the court:—

This was an action for breach of contract, in not delivering 1170 bales of gambier, pursuant to a contract of sale whereby the defendants contracted to sell and deliver to the plaintiffs 1170 bales of gambier, stated to be "now on passage from Singapore, and expected to arrive at London; 805 bales per Ravenscraig, and 365 per Lady Agnes Duff, at 15s. 6d. per cwt.;" with a proviso that, should either or both vessels be lost, the contract was to be void for the quantity so lost.

Both vessels in fact arrived at London, each with the specified number of packages of gambier on board, on the defendants' account; but, these packages proving to be only about one-third of the ordinary size and weight of the packages of gambier known in the trade as "bales," the plaintiffs declined to accept them as a performance of the contract. By arrangement, however, with the defendants, they afterwards accepted them, without prejudice to their rights under the *con- [699 tract, and brought this action in respect of the difference.

Besides the packages of gambier before mentioned which arrived consigned to the defendants, there came also in the two ships, the Ravenscraig and Lady Agnes Duff, but consigned to other parties, a number of bales of gambier, of the full and accustomed size and weight, sufficient to have satisfied the contract.

The declaration contained two counts. The first treated the statement in the contract that the bales were then on their passage from Singapore, as a warranty, and alleged as a breach of such warranty that the 1170 bales of gambier were not at the time of making the agreement on their passage from Singapore within the true meaning of the contract: the other count, proceeding on the assumption that the bales of gambier had in fact arrived in the specified quantities by the ships in question, alleged the non-delivery of the same as a breach of the defendants' contract.

Thus, both at the trial, and on the argument before us, it was contended, on the part of the plaintiffs, that, either the contract, by virtue of the alleged warranty, must be treated as an absolute sale, in which case the contract had been broken by the omission to deliver bales of the proper weight according to the trade-meaning of the term; or, if the contract was to be treated as conditional on the arrival of the bales, then that this condition was satisfied by the arrival of the bales which came consigned to other parties by the Ravenscraig and Lady Agnes Duff. For the latter position, the case of *Fischel v. Scott*, 15 C. B. 69 (E. C. L. R. vol. 80), which was recently before this court, was relied on as an authority.

To establish the breach in the first count, the plaintiffs tendered evidence at the trial, that the term "bales," used in the contract, had a

*700] particular signification in the gambier trade, and that it meant a *compressed package weighing about 2 cwt. The jury found both these facts in the affirmative. This evidence was objected to at the trial, and its inadmissibility was made one of the grounds on which the rule nisi was moved for.

This objection was not, indeed, persisted in on the argument before us; but, as it appears in the rule, it may be as well to observe that we entertain no doubt whatever that the evidence was properly received.

For the defendants, it was contended that the contract was conditional on the arrival of the gambier, and that the case fell within the principle of the cases cited in the argument, in which it has been held, that, in a contract for the sale of goods "to arrive," or "expected to arrive" by a particular ship, the obligation is conditional on the double event, first, of the arrival of the ship, and, secondly, of the goods being on board.

Without desiring at all to interfere with the rule laid down in the cases referred to, we may, in passing, observe that we think it has been carried far enough, and that its effect may have been to introduce uncertainty into contracts which were not intended by the parties to be contingent on accidental circumstances, such as, the transfer of a cargo from one ship to another. We are, however, of opinion that the present case is plainly distinguishable from those referred to, by the statement that the goods were on board at the time the contract was entered into. We are of opinion that this statement amounts to a warranty; and although, if circumstances had subsequently occurred whereby the arrival of the goods had been prevented, the defendants might have been protected by the words "expected to arrive," we think they cannot resort to them to get rid of the positive assurance that the goods were then on their passage; on the faith of which, possibly, the purchaser may have entered into the contract to buy.

*701] *Our opinion being thus in favour of the plaintiffs on the first count of the declaration, it becomes of less importance to consider the case with reference to the second: nevertheless, as the authority of *Fischel v. Scott* was much pressed upon us in the argument, we think it right to say a few words on this part of the case.

It is, in the first place, to be observed that there was not in *Fischel v. Scott* any positive adjudication of the court. Observations were thrown out during the discussion in that case, by individual members of the court, upon which the counsel for the plaintiff elected to amend. But what is still more material is, that the facts of the present case are plainly distinguishable from those in *Fischel v. Scott*. In the latter case, the defendants had taken upon themselves to sell the goods, trusting to their coming consigned to them. Jervis, C. J., observes,—“The oil which was expected did arrive: the defendants expected it to come consigned to them; but it turned out that it was consigned to some one

else." Here, the bales of gambier, on the arrival of which the plaintiffs in their second count rely, never were expected by the defendants to come consigned to them; nor did they affect to deal with them. On the contrary, the goods which they expected actually arrived consigned to them, only not in such a form and quantity as to satisfy the terms of the contract.

Now, it may well be, that if a man takes upon himself to dispose of goods expected to arrive by a certain ship, as goods over which he has a power of disposal, and the goods afterwards arrive not consigned to him, he shall be precluded from saying that, in addition to the contingency of their arrival, there was implied the further contingency of their coming consigned to him. He has dealt with them as his own, and cannot be allowed to import into the contract a new condition, viz., that the goods on their arrival shall prove to be his. *It is obviously a very different thing to say, that, where a man has sold [*702 certain specific goods, subject to the contingency of their arrival, the arrival of a different cargo, though of similar goods, consigned to another person, and with which the vendor has never affected to deal, will operate to fix him with consequences against which he has expressly guarded himself.

Rule discharged.(a)

(a) See *Hale v. Rawson*, 3 C. B., N. S.

In the Matter of the Complaint of JOHN PAINTER against THE LONDON, BRIGHTON, and SOUTH COAST RAILWAY COMPANY. *June 9.*

A railway company granted exclusive permission to a limited number of fly-proprietors to ply for hire within their station:—The court refused to grant a writ of injunction against the company, under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), at the instance of a fly-proprietor who was excluded from participation in this advantage,—although it was sworn by the complainant and by several other fly-proprietors who were likewise excluded, that occasional delay and inconvenience resulted to the public from the course pursued.

LUSH moved for a writ of injunction against the London, Brighton, and South Coast Railway Company, under the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, s. 2, to restrain them from giving an undue preference to certain persons named, and imposing an undue and unreasonable prejudice on the complainant.

The motion was founded upon the affidavit of the complainant, which stated that the directors of the company, or their officers at Brighton, had granted to five fly-proprietors at that place, named, &c., owning together about fifty-six flies, certain privileges and advantages for the entry of the whole of their flies into the terminus at Brighton, for the conveyance of passengers arriving there by all the down-trains, in pri-

*708] ority and exclusion of all the flies belonging to the other *proprietors in the town; the arrangement being that, until the whole of the flies in attendance of the above-named persons had entered and obtained fares, no other flies were permitted to enter or approach the platform, or take up passengers, which virtually was almost a monopoly of the traffic, as only on occasions when heavy trains arrived were more flies required than the persons above named could supply: That the fly-proprietors generally considered the preferential arrangement above described so made with the persons named, not only unfair towards them, but also very disadvantageous and prejudicial to the passengers, by reason of its preventing a proper supply of flies at the terminus, as the fly-owners who had not the same privileges, and were prevented entering the station in due turn of arrival, could not afford to wait on the bare chance of a sufficient number of the flies of the privileged persons not being there, or of the passengers by any train being more numerous than could be accommodated by the flies of the privileged persons; the consequence of which had frequently been that many passengers had been detained at the station a considerable time, namely, until the privileged flies which had obtained fares had been and set down and then returned to the station, or other flies had been sent for and brought up to the terminus. The affidavit then went on to detail particular instances of obstruction offered to the complainant by the servants of the company, and refusal to permit him to enter into the arrival part of the station for the purpose of obtaining fares, and alleged, that the above-described arrangement was also prejudicial to the interests of the public, as in many instances it compelled the passengers, although the weather might be wet or cold, to ride in open carriages, against their wish: That the fly-proprietors were willing and had frequently offered to conform to and abide by any general rules

*704] of the *company for enforcing order and regularity: That if the station were open to all flies without preference, and all were allowed to enter in due course of arrival, the complainant's fly would be in the habit of attending, and complainant believed the flies of the other owners would attend also, and that there would be a much better supply of flies, and that the public would not be subjected to the inconvenience they were often put to under the existing arrangement: And that the complainant believed that the company's station at Brighton was large enough to admit many more flies and carriages than the privileged parties usually had been in the habit of sending there to meet the trains, and that it would be no inconvenience to the company if all cabs and flies, without distinction, were allowed to enter it in turn for the purpose of taking up fares in the same manner as the deponent was informed and believed they did at the central station in London.

There were also the affidavits of six other fly-proprietors who were

similarly excluded from the railway station, and who deposed generally to inconvenience sustained by passengers from such exclusion.

It was submitted that the affidavits disclosed a clear violation of the statute. [CRESSWELL, J., referred to *In re Beadell*, antè, p. 509, where a similar application was made on behalf of a cab-proprietor against the Eastern Counties Railway Company, and refused.] The circumstances of that case were totally different from those here: no inconvenience to *the public* being there shown to have arisen from the arrangement into which the company had entered; whereas, here, it is distinctly shown that the public *are* inconvenienced by the preference shown by this company to the five favoured proprietors of frys. It appears, that, at the terminus in London, all vehicles are allowed to enter the *company's premises in turn without any partiality or preference; [*705 and it is sworn that the same arrangement might be made at the Brighton station without any inconvenience or obstruction to the company.

CRESSWELL, J.—I am of opinion that no ground is presented to justify the interference of the court. Before we put the powers of the act in motion, we must be satisfied that there is some substantial injury or inconvenience to the public, and that the complaint is bonâ fide made on behalf of the public.(a)

WILLIAMS, J.—The complaint must come from those who use the railway.

The rest of the court concurring,

Rule refused.

(a) See *In re The Caterham Railway Company*, 1 C. B. N. S. 410 (E. C. L. R. vol. 87), *In re Barret*, Ib. 423, *In re Marriott*, Ib. 499.

*TETLEY v. EASTON and Another. June 11. [*706

A patentee describing his invention in the specification, is to be taken to claim as part of his invention all that he describes as the means by which it is to be carried into effect, unless he clearly expresses a contrary intention.

The plaintiff obtained a patent for "certain improvements in machinery for raising and impelling water and other liquids;" and by his specification he described a machine for raising and impelling water by centrifugal force, the material parts of which were as follows:—"g g is an iron case made air-tight. In the interior of the case g g is placed a hollow wheel, having hollow spokes or radial arms, of which q q are two: r r I call the nave, which is hollow; and s s are two hollow shafts, one at each side of the wheel. In the interior of the nave r there is a boss or plate of metal, marked u, which is cast in at the time the wheel is cast, and which carries the wheel. The shaft i i passes through the centre of this plate, and is firmly keyed in." "In reference to the hollow wheel, I do not confine myself to the number or to the use of hollow spokes, but, in some cases, purpose to substitute circular discs, with a narrow water channel between them, and a valve or flexible valve or valves on the circumference, so as to have a channel or channels in the interior thereof for the passage of liquids, and adapted to neutralize the effects of suction, by having a corresponding or proportionate degree of suction at each side." "I shall now proceed to explain more particularly what I claim as my invention or inventions. I do not claim to be the discoverer that liquids may be raised by centrifugal force, nor do I claim in any way the sole application of machinery for raising water on other liquids by centrifugal force." He then introduced nine several distinct claims, the whole

of which were subsequently by two memorandums of disclaimer struck out, except the following:—"I claim as my invention and application the means of increasing the action of the machine by causing the liquid to enter the wheel at both sides." And by one of the memorandums of disclaimer, the plaintiff stated,—"I disclaim any exclusive right to wheels, whether consisting of hollow spokes or of a channel or channels between discs, when considered apart or separately from the machinery described: and I also disclaim any exclusive right to the parts of the machinery when they are each considered apart or separate from the machinery described."

Upon the trial of an action for an infringement of the patent, in which issues were taken on the plaintiff's being the first inventor and on the novelty of the invention, it appeared that one R. had previously patented an invention of "a new mode of increasing the power of certain media when acted upon by rotary fans or other similar apparatus," the specification of which described a series of fans revolving in cases into which the air or water to be acted upon *was admitted equally on both sides*. The fans and cases so described in R.'s specification were almost identical with the wheel used by the plaintiff, except that they had not a *central disc*, and were attached to the axle by spokes extending from the axle to the outer edge of the openings for the admission of the air or water:—

Held, that, as neither the form of the wheel used by the plaintiff, nor the plan of admitting water at both sides for the purpose of being projected forward by centrifugal force was new, the plaintiff could not claim to be the inventor of "the means of increasing the action of the machine by causing the liquid to enter the wheel at both sides;" and, consequently, that he failed upon the issues of invention and novelty.

The discovery that a particular advantage may be attained by the use of a machine known before, in a manner known before, is not an invention or application which can be made the subject of a patent.

And, per Cresswell, J., the effect of a disclaimer is, merely to strike out from the specification those parts of the machinery which are disclaimed: it cannot be read as explanatory of that which remains.

THIS was an action for an alleged infringement of a patent.

The declaration stated that the plaintiff was the first and true inventor
 *707] of a certain new manufacture, viz., "of certain improvements in machinery for raising and impelling water and other liquids, and also thereby to obtain mechanical power;" and thereupon Her Majesty Queen Victoria, by letters patent duly sealed in that behalf, to wit, under the Great Seal of the United Kingdom of Great Britain and Ireland, granted the plaintiff, his executors, administrators, and assigns, the sole privilege to make, use, exercise, and vend the said invention within England for the term of 14 years from the 11th of February, 1846, subject to a condition that the said plaintiff should within six calendar months next after the date of the said letters patent cause to be enrolled in the high court of Chancery an instrument in writing under his hand and seal, particularly describing and ascertaining the nature of his said invention, and in what manner it was to be performed; that the plaintiff did within the time prescribed fulfil the said condition; that, on or about the 14th day of April, 1853, the plaintiff, according to the statute, duly entered with the clerk of the patents of England, a disclaimer of part of the title of the said invention, and a disclaimer and memorandum of alteration of parts of the said specification, which said disclaimer and memorandum of alteration was duly filed by the said clerk of the patents and enrolled with the said specification; that, on or about the 20th of April, 1854, the plaintiff, according to the statute, duly entered with the clerk of the patents

of England another disclaimer and memorandum of alteration of other parts of the said specification, and which said last-mentioned disclaimer and memorandum of alteration was duly filed by the said clerk of the patents, and enrolled with the said specification; and that the defendants during the said term, and after the enrolment of the said last-mentioned disclaimer and alteration, did infringe the said patent right of the plaintiff.

*The following were the particulars of breaches delivered with the declaration:— [*708

“That the defendants, since the filing of the disclaimer and memorandum of alteration lastly mentioned in the declaration, have made and vended or used machines for raising water by centrifugal force, which said machines are known as centrifugal pumps, and which machines so made and vended or used have the combinations of the several parts as follows, viz., of a hollow wheel having a central plate and outer discs, with an axle and pulley, with an enclosing case for the said wheel, with two supply-pipes whose area respectively in horizontal section is greater than the area of the respective apertures into the said hollow wheel,—or, otherwise, of one supply-pipe in which the water diverges to the two sides of the said hollow wheel, such last-mentioned supply-pipe being of a greater area in its horizontal section internally than the area of the two apertures into the said hollow wheel,—jointly with a stuffing-box; whereby, in virtue of such combinations, the machines made and invented or used as aforesaid perform more beneficially, and are more commercially useful than other combinations known at the date of the plaintiff's patent, for the purpose of raising water or other liquids by centrifugal force.”

The defendants pleaded,—first, that Her Majesty did not by the said letters patent in the declaration mentioned, make such grant as alleged,—secondly, that *the plaintiff was not the first and true inventor* of the said supposed invention in the declaration mentioned, as alleged,—thirdly, that *the said supposed invention was not a new manufacture*, as alleged,—fourthly, that the plaintiff did not within six calendar months next after the date of the said letters patent cause to be enrolled in the High Court of Chancery any instrument in writing under his hand and seal, particularly describing *and ascertaining the nature of the said invention, and in what manner the same was to be performed,—sixthly, that the supposed disclaimers and memorandums of alteration in the declaration mentioned, were not entered, filed, and enrolled, as alleged,—sixthly, not guilty. Issue thereon. [*709

There had been two other actions by the plaintiff against the defendants, for the same alleged infringements. The first of these was tried before Pollock, C. B., at the sittings in the Exchequer at Westminster after Michaelmas Term, 1852, and resulted in a verdict for the defend-

ants upon pleas negating that the plaintiff was the first inventor, that the invention was new, and that a proper specification had been enrolled.

The defendant thereupon (under 5 & 6 W. 4, c. 83, s. 1) entered the memorandum of disclaimer and alteration hereinafter set out at p. 720, and commenced a fresh action in the Court of Queen's Bench, to which the defendants pleaded pleas similar to the first, second, third, fourth, and seventh pleas in this case. The cause was tried before Wightman, J., at the Summer Assizes at York in 1853, when that learned judge ruled that the specification was too large, inasmuch as it claimed absolutely the wheel as therein described, whereas the evidence showed that the wheel was not new, it being described in a patent previously taken out by one Ruthven (referred to, post, p. 727), and directed a verdict to be entered for the defendants on the second and third issues. A rule was afterwards obtained for a new trial, on the ground of misdirection, which was afterwards discharged: see *Tetley v. Easton*, 2 Ellis & B. 956. The plaintiff thereupon entered the second memorandum of disclaimer and alteration set out at p. 723.

This cause was tried before Willes, J., without a jury, at Guildhall, on the 31st of October last.

*710] *The plaintiff's specification and disclaimers, which were put in, were as follows: (a)

"Whereas Her present most excellent Majesty, Queen Victoria, by Her royal letters patent under the great seal of Great Britain, bearing date at Westminster, the 11th of February, in the ninth year of Her reign (1846), did, for Herself, Her heirs and successors, give and grant unto me, the said Charles Tetley, my executors, administrators, and assigns, Her especial license, full power, sole privilege, and authority, that I, the said Charles Tetley, my executors, administrators, and assigns, or such others as I, the said Charles Tetley, my executors, administrators, and assigns, should at any time agree with, and no others, from time to time and at all times during the term of years therein expressed, should and lawfully might make, use, exercise, and vend, within England, Wales, and the Town of Berwick-upon-Tweed, and in the Islands of Guernsey, Jersey, Alderney, Sark, and Man, and also in all Her said Majesty's colonies and plantations abroad, my invention of 'certain improvements in machinery for raising and impelling water and other liquids, *and also thereby to obtain mechanical power*;' in which said letters patent is contained a proviso that I, the said Charles Tetley, shall cause a particular description of the nature of my said invention, and in what manner the same is to be performed, to be enrolled in Her said Majesty's High Court of Chancery within six calendar months next and immediately after the date of the said in part recited letters patent,

(a) The portions of the specification in italics are those which are disclaimed or altered by the two memoranda of disclaimer hereinafter set out,—the parts affected by the second disclaimer being enclosed within brackets.

as in and by the same, reference being thereunto had, will more fully and at large appear :

*. Now know ye, that, in compliance with the said proviso, [*711 I, the said Charles Tetley, do hereby declare that the nature of my said invention, and the manner in which the same is to be performed, are fully described and ascertained in and by the following statement thereof, reference being had to the drawings hereunto annexed, and to the figures and letters marked thereon, that is to say :—

“ In order that my improvements may be understood, reference must be had to the accompanying drawings, marked figures 1, 2, and 3.

“ In reference to figure 1, *a* is a pipe, the lower extremity of which is supposed to extend down into the water or liquid to be raised. The upper end at *b* diverges into two branches marked *c c*. At the top end of each branch is an air-tight iron box, each of which is marked *d d*, and each having a removable lid at the side marked *e e*. [*fff* is a pipe of small diameter, forming a passage for air from one box to the other, by which means one exhausting air-pump answers for both boxes]. *g g g* is an iron case made air-tight. *i i* is a wrought iron shaft, at one end of which is either a pulley or a toothed wheel marked *j*. *k k* are two journals or bearings fixed in the inside of the boxes *d d*, for the purpose of carrying the shaft *i i*. *m* is a stuffing box, which makes the passage through which the shaft *i i* passes into the box *d* air and water tight. *n o p* is a pipe which joins to the under part of the case *g g g* by means of the bend at *o*, and which may, when desirable, be enlarged at *o*, and provided with valves opening upwards. In the interior of the case *g g* is placed a hollow wheel, having hollow spokes or radial arms, of which *q q* are two; *r r* I call the nave, which is hollow; and *s s* are two hollow shafts, one at each side of the wheel. *t t* are two stuffing boxes, truly bored, and the shafts *s s* are truly bored to fit them.

*“ In the interior of the nave *r* there is a boss or plate of [*712 metal marked *u*, which is cast in at the time the wheel is cast, and which carries the wheel in the manner shown in the other section, marked figure 2. The shaft *i i* passes through the centre of this plate, and is firmly keyed in. On the end of each of the hollow spokes *q q* is fixed a short piece of pipe or tube, made of leather or of india-rubber, or other flexible and water-proof material or materials, and which are marked *v* and *w*; the one marked *v* being shown as open, and the one marked *w* being shown as shut or collapsed. These flexible valves are to be secured in a firm and air-tight manner on to the ends of the spokes by clamps or other secure means. *x* is an exhausting air-pump for drawing air out of the machine, and *y* is the piston-rod thereof. *z z* are two vanes, a front view of which (in the interior side) is shown in Figure 3, and which are fastened on to the shaft *i i* so as to revolve with it. A manhole is to be provided in some part of the case *g g*, but which is not

shown in the drawing. All the parts which have now been described (in Figure 1) are represented in cross vertical section, with the exception of the air-pump, the pipe *n o p* [and the pipe *f f f*], of which three the drawing shows merely an external view. The top end of the pipe *n o p*, the lower part of the pipe *a*, and the top end of the pump-rod, are represented as broken off, it being to be understood that of the former the first may be conducted where the liquid is desired to be conveyed, and the second into the well or liquid to be raised, while the pump-rod may be connected to the moving power in any way most convenient.

"Figure 2 represents a vertical section of the hollow wheel already described in Figure 1, taken through the dotted line *c' c'*, or through the plane in which the wheel revolves. *g g* are the hollow spokes; *v v* and *w w* are the flexible valves, five of which are shown as *713] open, and three as collapsed; *u* is the boss or plate of metal carrying the wheel; *i* is the hole therein for the solid shaft. From an inspection of this figure, it will be seen how the plate *u* is made to carry the wheel, while, from an inspection of Figure 1, it will be seen that the hollow spokes are enlarged in their cross-section at the ends next the nave, so as to admit the liquid to pass at each side of the plate *u* into the spokes.

"The operation of the machine is as follows:—Let the attendant first close all the flexible valves at the ends of the hollow spokes, and then put the air-pump *x* into operation to exhaust the air from the interior of the wheel, the boxes *d d*, the pipes *c c* and *a*. As this exhaustion takes place, the liquid will rise up the pipes *a* and *c c*, and fill the boxes *d d*, and the wheel. After the exhaustion of the air just mentioned has begun to take place, all the flexible valves will remain closed and air-tight, in virtue of the external pressure of the atmosphere, so long as the machine is at rest. After the wheel has become filled with the liquid, let it be put into rapid rotatory motion by means of the pulley or toothed wheel *j*. The speed at which the hollow wheel revolves must be so regulated as to communicate to the liquid which now fills the hollow spokes such a degree of tendency to fly off (or out) by virtue of the centrifugal force imparted thereto as will cause it to force open the flexible valves, notwithstanding any pressure of air externally thereon, and fly out. The liquid will be received into the iron case *g g*; as one portion of liquid comes out of the hollow wheel, a corresponding portion will ascend up the pipes *a* and *c c* to supply its place. Now, if it be not intended to raise the water more than twenty-eight or from that to thirty-two feet, that is to say, not higher than the force of the atmosphere would lift it in vacuo (computing *such distance from the *714] surface of the water to be raised to the hollow shaft), then the water or liquid may at once be drawn from the case and conveyed where desired, the machine as now described being sufficient. In such in-

stances, however, it is not requisite the case should be air-tight, but **may** be open at the sides, and in some instances there need be no case at all. But, if it be desired to raise the water higher than such distance without employing two machines, then the case must be air-tight, and the further operation will be as follows:—The pipe *n o p* may be filled with the water or other liquid to be raised, and, either by the aid of a forcing air-pump or any other ready method known for such purposes, the air-tight case is to be filled or charged with as much compressed air as will balance the column of liquid in the pipe *n o p*, whatever may be the height of the column, without suffering the liquid to rise high enough in the case to submerge any part of the wheel. Means must also be provided to renew such compressed air from time to time as may be required. Inasmuch as this can always be done by a forcing air-pump as well as several other methods which are well known, I have not exhibited any means of doing so in the drawings, it being unnecessary. Now, the case being filled with air so compressed, and the hollow wheel with its supply pipes being filled with the liquid to be raised, as before described, then such speed in the rotation of the wheel must be communicated as will throw the liquid out of the wheel into the case, notwithstanding the latter being charged with air so compressed. The liquid so thrown out of the wheel will fall to the bottom of the case, and the pressure of the compressed air on its surface will force it out by the pipe *n o p* with the same velocity with which the wheel introduces it into the case, and by that means prevent the liquid rising in the case to impede the rotation of the wheel. *By this means, [*715 the liquid may be raised the height desired above thirty-two feet, care being taken to make the case and all the other respective parts of the strength requisite to sustain the pressure. I would, however, observe something upon that law of hydraulics by which the motion of liquids ascending decreases in speed in proportion to the height or length of the ascending pipe or channel. For example, if the hollow wheel in Figure 1 be thirty feet above the surface of the water in the well, then the liquid would not rise up the pipes *a* and *c c*, with near the same velocity as it would do if the wheel was but twenty feet above the liquid to be raised. Therefore, if the pipes *a* and *c c* are made of such diameter as only to have the same area for the passage of the water up them as is the area of the shafts of the hollow wheel, they will in such case not supply sufficient water for the wheel. It is found that the decrease in speed of water ascending perpendicular pipes is nearly as the square root of the distance between the water to be raised and the point of discharge. *Upon this I found one part of my invention or improvements, namely, to (a) make the pipes a and c c of such internal area over and above the internal area of the hollow shafts of the wheel, as will cause them to pass as much water, notwith-*

standing the slower motion thereof up such pipes in consequence of their length, as will supply the wheel with all it can discharge. Now, in the drawing, these pipes are shown of too small a diameter to give full effect to this improvement if they are of any considerable length. This being understood, I would now say that I prefer to make the area of such pipes as many times greater than the area of the hollow shafts as is the square root of the distance (*a*) between the surface of the water to be raised and the said hollow shafts, or thereabouts. I would *716] next observe, in regard to the vanes marked *z z* in Figure 1, *which form another part of my invention or improvements*, that, although I do not consider them necessary to the action of the machine, yet, in cases where the height of the column of water in the supply pipes *a* and *c c* is such as to become nearly a balance to the pressure of the external atmosphere, then by their oblique action upon the water these vanes expedite or force the water into the wheel, which in some degree becomes necessary in consequence of the water not being pressed in by the atmosphere with the same force it would when the column of water in the ascending pipes is a short one. The screw now in use for propelling steam vessels may be substituted for these vanes, or their configuration may be varied in any manner, so long as such oblique action upon the water is secured as will expedite its passage into the wheel.

"The operation of the machine having now been explained, and its general principles exemplified by the drawings, I now proceed to explain the several points following, namely:—

"Where the terms 'liquid' or 'water' are used in this my specification, I mean the same to imply either water or any other liquid not injurious to the materials used in the construction of the machine. In this sense, of course, acids are excepted. I do not confine myself to the use of iron, where other metals or other materials may be substituted. I do not confine myself to the use of pipes or tubes as channels for conveyance of the liquids, but propose to use vessels of any desired configuration. I do not in all cases propose to have a solid shaft passing through and carrying the hollow wheel, but in some cases to dispense with the same, and to cause the hollow wheel to revolve on its own hollow shaft passing through stuffing boxes. In some cases I propose also to dispense with hollow shafts for the wheel, and merely *717] to have an opening at each side of the nave for admitting the liquid. [*In some special cases I propose to have an entrance for the liquid into the wheel at one side thereof only, and to counterbalance the suction arising therefrom, by producing a corresponding degree of suction at the other side, without admitting the liquid at the last-mentioned side.*] Where the term 'suction' is used in this my specification, I mean and intend the same to signify the difference produced by the abstraction or partial abstraction of air from the inside, and the

pressure of air externally to the supply pipes. *If any gases or elastic media, other than atmospheric air, are used, with which to charge the case, I claim the sole right to do so.* In reference to the hollow wheel, I do not confine myself to the number or to the use of hollow spokes, but in some cases propose to substitute circular discs, with a narrow water channel between, and a valve or flexible valve or valves on the circumference; *and generally I propose to construct the wheel of every variety of configuration so long as the same is constructed so as to have a channel or channels in the interior thereof for the passage of liquids, and shall be adapted to neutralize the effects of suction by having a corresponding or proportionate degree of suction at each side; nor do I confine myself to a form or configuration or manner of connecting together any other parts of the machine, but I propose to vary the same.* *The manner in which I propose to obtain mechanical power, as signified in the title of the patent granted unto me, is, by using water raised by this machine as a moving power when wind is applied to this machine to raise the water, such water so raised forming a reservoir of power during the existence of calms.* In reference to the flexible valves at the ends of the hollow spokes, I prefer to make each of them of two halves or pieces lengthwise, and sewed or otherwise fastened up each side, by which means they collapse according **to their weakest* [*718 form, and are thereby rendered more air-proof. In lieu of the exhausting air-pump, the machine may be primed by any more convenient and ready method. In lieu of the stuffing-boxes, joints may be made air-tight by leather, or any suitable means. In some places I propose to place the air-tight case in the liquid to be raised, dispensing altogether with the supply pipes *a* and *c c*. I also propose to place the hollow wheel horizontally, or in any other position, as may be desirable.

“Having now explained the manner in which my machine operates, or in which my inventions act, and pointed out that the machinery by which the said inventions act may be varied almost to an indefinite extent in the manner of its construction, I shall now proceed to explain more particularly what I claim as my invention or inventions. I do not claim to be the discoverer that liquids may be raised by centrifugal force, nor do I claim in any way the sole application of machinery for raising water or other liquids by centrifugal force, *[except only when the same is used as a means of introducing liquids into compressed air]* or other elastic fluids, *as specified hereinafter in my fifth claim.* Now, therefore,—(a)

[First, I claim as my invention and application the means of neutralizing or diminishing the effects of suction at one side of the wheel by causing the same degree (or such other proportionate degree as may

be required) of suction at both sides thereof, whereby a considerable saving of power is effected.]

"Second, I claim as my invention and application the means of increasing the action of the machine by causing the liquid to enter the wheel at both sides.

"Third, I claim as my invention and application the means of economizing the power required to move the wheel, by causing the same to be *719] mounted on a solid shaft *(or a shaft of small diameter) passing through its centre to carry the same.

"Fourth, I claim as my invention and application to this machine, or to the hollow wheel, flexible and collapsible valves, that is to say, valves made of leather, or leather combined with other suitable flexible substance or substances, or other suitable flexible and collapsible substance or substances without leather.

"[Fifth, I claim as my invention and application the construction of machinery for raising and impelling water and other liquids by means of introducing such water or other liquids into compressed air] or other suitable elastic fluid [in virtue of centrifugal force imparted thereto by such machinery, and causing such compressed air], or other elastic fluid [to operate as the lifting, raising, impelling, or forcing power to impel such water or other liquid upwards.]

"Sixth, I claim as my invention the application of an exhausting air-pump to maintain a vacuum of air to such of these machines as act by the maintenance of the vacuum of air in the hollow wheel and its supply pipes.

"Seventh, I claim as my invention and application, where pipes or channels are used to convey water or other liquids up to the hollow wheel, to make such pipes or channels of such internal sectional area over and above the area of the opening or openings into the hollow wheel as will enable them to pass liquid to supply the wheel at a greater rate than could be done if such pipes or channels were not of such increased area.

"Eighth, I claim as my invention and application the use of vanes or screws whose oblique action upon the water shall impel the water more rapidly out of the supply vessels into the hollow wheel.

"[Ninth, I claim the application of the before-mentioned inventions both when all used in combination, or when used severally.]"

*720] *The first disclaimer, dated the 13th of April, 1853, was as follows:—

"Disclaimer and memorandum of alteration entered by the said Charles Tetley with the clerk of the patents of England.

"Whereas the following part of the title of the said invention, namely, 'and also thereby to obtain mechanical power,' and part of the said specification contained in the following words, namely, 'the manner in which I propose to obtain mechanical power, as signified in the title of the patent granted unto me, is, by using water raised by this machine as a moving power when wind is applied to this machine to raise the

water, such water so raised forming a reservoir of power during the existence of calms,' have been respectively objected to as not describing or referring to anything of practical value or utility; wherefore I do declare that I hereby disclaim such part of the said title of the said invention, and such part of the said specification respectively.

"And whereas it has been alleged that the making pipes or channels for the supply of water of an area greater than the area of the shaft of the wheel or the aperture of the raising apparatus was known at the date of the said letters patent, I do hereby declare that I disclaim the part of the said specification contained in the following words, namely:— 'Upon this I found one part of my invention or improvements, namely.' And I also disclaim the part of the said specification contained in the following words, namely:— 'which form another part of my invention or improvements.' And I also disclaim the seventh claim and claiming clause contained in and being part of my said specification.

"And whereas the following passage of the said specification, 'I do not confine myself to the number or to the use of hollow spokes, but in some cases propose to *substitute circular discs with a narrow water channel between, and a valve or flexible valve or valves [721 on the circumference, and generally I propose to construct the wheel of every variety of configuration, so long as the same is constructed so as to have a channel or channels in the interior thereof for the passage of liquids, and shall be adapted to neutralize the effects of suction by having a corresponding or proportionate degree of suction at each side,' has been alleged to include a wheel such as is described in the two several specifications of Hale's patents, which patents are respectively dated the 12th of January, 1830, and the 13th of October, 1831; wherefore I hereby declare that I disclaim the words, 'and generally I propose to construct the wheel of every variety of configuration, so long as the same is constructed,' and the words 'shall be,' contained in the above-recited passage of the said specification.

"And whereas it has been objected and alleged that the third, fourth, sixth, and eighth claims, contained in and being parts of the said specification, amount to and are respectively claims of and to distinct and independent inventions, I do therefore hereby disclaim such last-mentioned parts of the said specification respectively.

"And whereas no other elastic fluid is more suitable or economical than air. I therefore disclaim in the said specification that part thereof contained in the words following, namely:— 'If any gases or elastic media other than atmospheric air are used with which to charge the case, I claim the sole right to do so;' and also that part thereof contained in the words following:— 'or other elastic fluids, as specified hereinafter in my fifth claim;' and also the words 'or other suitable elastic fluid,' in and part of the fifth claim of the said specification; and also the words 'or other elastic fluid,' also in and part of the same

*722] fifth claim. And *in order to make the said specification, after the parts thereof hereinbefore mentioned shall have been disclaimed as aforesaid, consistent, I do hereby declare that I alter the said specification by expunging the word 'to' in the part of the said specification following, namely, 'to make the pipes *a* and *c c* of such internal area over and above the internal area of the hollow shafts of the wheel as will cause them, &c.' And I further alter the said specification by adding and substituting the word 'I' in the place and stead of and for the word 'to' so expunged as last aforesaid.

"And whereas the sentence and words following are contained in and form part of the said specification, namely, 'this being understood, I would now say that I prefer to make the area of such pipes as many times greater than the area of the hollow shafts as is the square root of the distance between the surface of the water to be raised and the said hollow shafts, or thereabouts;' and it has been pretended and alleged that the said last-mentioned sentence is not so certain as it might be. Now, therefore, I declare that I alter the said specification by introducing to and into the said last-mentioned sentence and part of the said specification the words 'in feet' immediately after the word 'distance' in the said last-mentioned sentence, and between such word 'distance' and the word 'between,' also contained in the said last-mentioned sentence and part of the said specification. And, in order further to make the said specification, after the parts thereof hereinbefore mentioned shall have been disclaimed as aforesaid, consistent, I do hereby declare that I alter the word 'fifth,' at the commencement of the fifth claiming clause contained in the said specification to the word 'third,' and also the word 'ninth,' at the commencement of the last claiming clause contained in the said specification, to the word 'fourth.'"

*723] *The second disclaimer, dated the 19th of April, 1854, was as follows:—

"Disclaimer and memorandum of alteration proposed to be entered by the said Charles Tetley with the clerk of the patents of England, pursuant to an act passed in the fifth and sixth years of the reign of His late Majesty King William the Fourth, intituled 'An Act to amend the law touching letters patent for inventions.'"

"Whereas, near the end of the specification of the said letters patent is introduced a disclaimer, by which it was supposed that a wheel described in the said specification, whether consisting of hollow spokes or of a channel or channels between discs, was, when considered apart or separate from the other machinery, disclaimed; and, since the enrolment of the said specification, a further disclaimer of certain parts thereof has, according to the statute, been entered with and filed by the clerk of the patents of England. But it has lately been held by a court of law, that, notwithstanding these disclaimers, such wheel is claimed apart and separate from the other machinery; for which

reason, and in order to make the disclaimers more certain in regard to such wheel, and to prevent a like construction being put on the said specification in regard to the separate and individual parts of which the machinery consists, I hereby alter the specification by introducing immediately before the claiming clauses, near the end of the said specification, the following words, viz., ‘*I disclaim any exclusive right to wheels, whether consisting of hollow spokes or of a channel or channels between discs, when considered apart or separate from the machinery described. And I also disclaim any exclusive right to the parts of the machinery when they are each considered apart or separate from the machinery described.*’ And I have found that the invention *claimed as the first part of my improvements, though new, has not come into general use, for which reason I wish to disclaim, [*724 and I do hereby disclaim, that part of the specification which is contained in the first claiming clause near the end of the said specification, and also the following words, which occur at an early part of the said specification, ‘*fff is a pipe of small diameter, forming a passage for air from one box to the other, by which means one exhausting pump answers for both boxes.*’ Also, further on in the said specification, the words ‘*and the pipes fff;*’ also the word ‘*three*’ in the same paragraph, and also the part of the drawing showing such pipe and passages thereto; and also the following words, ‘*In some special cases, I propose to have an entrance for the liquid into the wheel at one side thereof only, and to counterbalance the suction arising therefrom, by producing a corresponding degree of suction at the other side, without admitting the liquid at the last-mentioned side.*’ And I have also found that the employing compressed air, described in my said specification, though useful in the cases mentioned, is beneficial only when in combination with the other part of my invention, and that there is consequently no advantage in my still retaining a claim to compressed air separate from and independent of my invention which remains claimed in the said specification, for which reason I disclaim the following parts of my said specification, ‘*except only when the same is used as a means of introducing liquids into compressed air,*’ and ‘*Third, I claim as my invention and application the construction of machinery for raising and impelling water and other liquids by means of introducing such water or other liquids into compressed air, in virtue of centrifugal force imparted thereto by such machinery, and causing such compressed air to operate as the lifting, raising, impelling, or forcing power to impel such water *or other liquid upwards.*’ [*725 And, as the last claim contained in the specification would be inconsistent and unmeaning after such disclaimer has been made, I disclaim the part of my specification contained in the following words, ‘*Fourth, I claim the application of the before-mentioned inventions, both when all used in combination, or when used severally.*’ ”

The utility of the plaintiff's machine was not denied; and there was evidence of infringement. But it was sought, on the part of the defendants, to show that the alleged invention was not new; for, that the principle had already been made known by certain specifications enrolled by one William Hale on the 12th of July, 1830, and 13th of April, 1832, and by one Morris West Ruthven on the 22d of September, 1841.

Hale's first patent, dated the 12th of January, 1830, was for "A machine or method of raising or forcing water for propelling vessels, which machine or method is also applicable to other purposes;" and, in his specification, the inventor declared "that the nature of his said invention consisted in a vertical or horizontal air-tight paddle-box, kept constantly supplied with water, and the sides of which, by means of a paddle-wheel or propeller turning in the said water, were forcibly acted upon at all points except at an aperture where the said water escaped, and where the resistance offered to the action of the said water was less than at the other parts of the paddle-box; wherefore the boat or other body to which the said paddle-box was attached would be propelled in a direction from the said aperture." He then went on to describe the manner in which the said invention was to be performed, thus:—"The propeller which gives motion to the water in this machine, is composed of one or more curved paddles, and set at an angle to prevent any vacuum behind them, revolving at the extremity of spokes or
*726] arms round on an axis *nearly in the middle of the machine. The dimensions of these surfaces vary according to their number, and the area of the aperture through which the water is discharged; that is, if the propeller has one paddle only, the area of that surface must be equal to the area of the aperture; if two are used, the area of each must be equal to half the area of the aperture; if four, then each must be equal to one-fourth of the area of the aperture, and so on, that, whatever the number of paddles may be, the area of the whole must be equal to the area of the discharging aperture." The specification then went on to describe the various parts of the machine, referring to the drawings, all of which had relation to propelling vessels; and it concluded thus:—"I claim as my invention the machine hereinbefore described, *whether applied vertically, to raise water, or horizontally, to force water, for the purpose of propelling vessels, or for other purposes.*"

Hale's second patent, dated the 13th of October, 1831, was for "Improvements in machinery or apparatus for propelling vessels, which improvements are also applicable for raising or forcing water:" and, in his specification, he thus describes the invention:—"My invention consists in the enclosing of a certain kind or kinds of rotary propeller or forcer within a scrole or volute box or case, whereby the water entering into such box or case is driven by the propeller round the spiral

side of the box or case, and is discharged forcibly through a tangential aperture, and thus force or propel the boat or vessel forward in which such apparatus is placed; and, secondly, such arrangements of propelling box or case, when fitted with suitable pipes, are applicable to raising or forcing water or other fluids." He then refers to the drawings in relation to the invention so far as regarded the propelling of vessels, and proceeded thus:—"Having now described the manner of *constructing my invention, and the application to the propelling of vessels, I will now proceed to describe its application for [*727 the purpose of raising and forcing water and other fluids. In this application of the apparatus, to the part *k* is to be affixed the pipe through which the water is to be forced in any direction it may be required, and the box or case *a* is to be placed in a well or other reservoir, either in a horizontal or vertical position, and by means of a crank or wheelwork rotary motion is to be communicated to the propeller *f*, which will force the water through the opening *k* into the pipe which is to convey it in any direction; or, in place of fixing the case in the water or other fluid, there may be a suction-pipe affixed at the opening *d*, and descending into the well or other reservoir, having a common valve opening inwards: by this arrangement, when the box or case and the suction-pipe have been filled with water or other fluid, the revolution of the propeller will drive the same through the opening *k*, to which there may or may not be a conducting pipe for conveying the water to any desired place, and at the same time as the water is forced out at the opening *k* there will be a constant flow of water up the suction-pipe into the case or box *a*. Having now described the nature of my invention, and the manner of carrying the same into effect, I would have it understood that what I claim as my invention, is, the constructing the apparatus so that the propellers *f* may freely revolve within a box or case, the form of which is a continually diverging curve, as above described, when such propellers and boxes or cases are applied to the purposes of propelling vessels, or *for raising or forcing water or other fluids*, as above described."

Ruthven's patent was for "A new mode of increasing the power of certain media when acted upon by rotary fans or other similar apparatus:" and he declared the *nature of his invention to consist "in [*728 causing the certain media, by which he meant to include air, gas, and water, about to be acted upon, to pass through a series of rotary fans, so arranged that each succeeding fan should act upon the media which had been previously acted upon by the next preceding fan, whether such media were gas, air, or water." He then proceeded to describe the invention, with reference to the drawings, as follows:—"Figure 1 is a side view of a series of three fans, with their appropriate cases, so arranged as to effect the object of my said invention, which in this case I have, for the purpose of this description, represented as

applied to increase the power of an air-blowing apparatus. A is the first air-case, B being the air induction hole. C C C are the arms of the fans, and D D D the frame-work of the bearings of the axes of the fans. E E the exit channel for the air, after having been acted upon by the fans, and by which it passes directly into the fans of the second air-case F, there to be acted upon again by the second set of fans, and driven through the exit channel G of the second air-case into the fans in the third air-case H, there to be again acted upon by the third set of fans, and finally expelled as a blast at the exit channel I of the third and last air-case H. By this arrangement, it will be seen that the air just taken in at the induction hole B of the first air-case A is the same that is expelled in the form of a blast at I, and has been acted upon successively by the three sets of fans. Figure 2 is the plan of figure 1. Figure 3 is a section of one of the air-cases with its fans, and here is shown what could not be seen in the other figures, but which is essential to be distinctly understood, viz. that there is an inner case revolving with the fans inside of the outer case. This inner case is in this figure marked K, and coloured blue, and to it the fans are fixed. Figure 5 *729] is a separate view of the inner case, with its fans, by which it will be seen there is an opening L in the rim of the case at the front of each fan, the fans, in fact, dividing the inner case into six compartments, or any other number, dependent, of course, on the number of fans. The air which is received into the opening at the axis rushes from the several compartments out of the openings L into the outer or air-case, and thence through the exit channel of the said air-case into the succeeding fan-case. The parts marked J are the driving pulleys. Figure 4 is a longitudinal section through the first air-case A, showing the form of the fans and the mode adopted in this case of fixing them to the inner casing: it also shows the induction hole to the second air-case F, the exit channel E being removed. Now, whereas it is evident that no particular form of fans is involved in my said invention, provided only that the medium to be acted upon be conveyed directly from one to the other of the series of fans, as hereinbefore described, and that whether the object to be obtained is a forcible jet of water or gas, or a strong blast of air, the same principle will prevail, the apparatus being only varied to meet the known necessity of the media employed. And whereas I therefore claim as my invention increasing the power of the said media, when acted upon by rotary fans or other similar apparatus, by causing the said media to pass directly from one set of fans, with their fan-cases as aforesaid, to another, through the whole series, as many as there may be, each succeeding set of fans acting upon it in the state in which it left the preceding set in consequence of the exit channel for the air from one set of fans forming the induction hole for the air to the succeeding set of fans, as shown by the figures in the drawing."

On the part of the plaintiff, it was insisted, that, taking his original specification together with the two *disclaimers, a claim was disclosed of a combination of machinery which constituted a new [*730 invention, and which was not affected by anything disclosed by the specifications enrolled by Hale, or by that enrolled by Ruthven.

The learned judge, being of opinion that the plaintiff's alleged invention had been previously disclosed by the specification enrolled by Ruthven, and the drawings annexed to it, directed a verdict to be entered for the defendants upon the second and third issues, and for the plaintiff on the others. *

Collier, Q. C., in Michaelmas Term last, pursuant to leave, moved to enter a verdict for the plaintiff on the second and third issues, on the ground that the invention was new.—Taking what remains of the plaintiff's specification, as explained by the disclaimers, that which he claims as his invention is clearly new. [CRESSWELL, J.—The effect of the disclaimer is, merely to strike out from the specification those parts of the machinery which are disclaimed. It cannot operate by way of a claim of the residue; nor can what remains of the specification be construed by the disclaimer.] The whole effect of the plaintiff's specification, as it now stands, is, to claim a new combination of machinery. [CROWDER, J.—Did not everything which the plaintiff claims exist before except the disc, or the substitute for the disc,—the carrying the wheel by a hollow shaft on both sides? WILLES, J.—The disc, I think, was old.] It is enough to say that the plaintiff claims either the disc or the hollow shaft: in effect, he claims the whole of what the specification describes, except that which is specifically disclaimed. Hale's first patent was simply for a machine for propelling vessels. [WILLES, J.—Hale's second patent was the most material one.] Hale's was a totally different machine: the principle of vacuum and *suction [*731 did not apply at all to his wheel. [WILLES, J.—It had a disc, and the water was admitted at both sides.] Its purpose and its operation were wholly foreign to the raising and propulsion of water. Ruthven's was an entire abortion. It had no disc, no hollow shaft; but it was so constructed that air or water might get in at both sides. [CRESSWELL, J.—You claim generally admitting water at both sides.] To a machine such as previously described. [CRESSWELL, J.—Would not Ruthven's wheel be an infringement of the plaintiff's patent? In *Newton v. The Grand Junction Railway Company*, 5 Exch. 331,† it was held, that, where a patent is granted for a combination of several things, some of which are old and some new, the question of novelty depends upon whether that which is claimed in the specification as a whole is new: and a person who, by some chemical or mechanical equivalent, imitates a part of such combination which is new and useful, is guilty of an infringement of the patent. CROWDER, J.—Does the specification confine the claim to the disc or hollow shaft? Yes; in

the manner and for the purpose before described. The specification is not very artificially drawn: but the court will put a reasonable construction upon the language used, and will not be astute to discover defects in it. In substance, the wheel, as described, is claimed in combination with the other things before mentioned.

CRESSWELL, J.—It seems to me that the plaintiff's claim must be understood as confined to the means of introducing water at both sides of the wheel. You contend that the specification does not claim the means generally, but only as previously described. My Brother Willes thinks that the matter should be discussed; but, on showing cause, the *782] defendants' counsel should *be at liberty to raise for argument any of the points which were taken by them at the trial.

Knowles, Q. C., *Hindmarch*, and *Kemplay*, in Hilary Term last, showed cause.—The result of the two disclaimers leaves only the second claim in the plaintiff's specification, which is in these terms,—“I claim as my invention and application the means of increasing the action of the machine, *by causing the liquid to enter the wheel at both sides.*” That now is conceded not to be new. It is, however, contended on the part of the plaintiff that his claim is so limited only when a wheel is used such as described in the previous parts of the specification. The former parts of the specification are thus made important. These, therefore, are not disclaimed, and, if any one of them is not new, the patent is clearly bad. If the central plate, or disc, which is confessedly old, is retained, the plaintiff was bound in his specification to state that it was old. In *Hindmarch on Patents*, 183, the law upon this subject is thus stated:—“If the specification describes more than the invention itself, it must clearly point out which of the things described are old, and which of them are new. And, if the subject of the patent privilege be an addition to or an improvement upon an old machine or other article, the specification must not describe the whole machine or article without distinguishing between the old and the new parts: for, the proviso in the patent requires that the invention shall not only be ascertained, but ascertained with particularity; and it is impossible to contend that an invention is so ascertained by a specification, if it describes without distinction many things which are old, as well as the invention itself.” For this the learned author cites *Williams v. Brodie*, Dav. P. C. 96, 97, *Manton v. Manton*, Dav. P. C. 333, 349, *Hill v. Thompson*, 3 Meriv. *622, *Hill v. Thompson*, 8 Taunt. 375 (E. C. *733] L. R. vol. 4), 2 J. B. Moore, 424 (E. C. L. R. vol. 16), to which may be added *Holmes v. The London and North Western Railway Company*, 12 C. B. 831 (E. C. L. R. vol. 74). And, when this case was before the Court of Queen's Bench,—see 2 Ellis & B. 956, 966,—Lord Campbell said: “It is quite clear that the patentee has described the wheel as part of the machinery for raising and impelling water. That is so both in the description and the diagram. Then it was proved, and

is now admitted, that the wheel is not new. That being so, the claim is *prima facie* bad, because *prima facie* all must be taken to be claimed which is described as part of the machinery. It then lies on the patentee to show that he has clearly pointed out what is not new; for, the rule is, that this must be done clearly. * * * Had the wheel been new, and the plaintiff had been suing for the infringement of this patent by the mere use of such wheel, this fourth claim would have furnished him with a most powerful argument to show that the patent was infringed: and the action would have clearly lain, according to *Smith v. The London and North Western Railway Company*, 2 Ellis & B. 69 (E. C. L. R. vol. 75). Even if this is not so, the exclusion is at least equivocal; and that is not enough to protect the specification: the law on this point is well explained in *Holmes v. The London and North Western Railway Company*, 12 C. B. 831 (E. C. L. R. vol. 74)." [COCKBURN, C. J.—The proper way to read the specification is, to read the whole description of the machinery, and the claim left unaffected by the disclaimers.] The central disc is twice mentioned in the descriptive part of the specification,—once at p. 712, line 1, and again at p. 713, line 2. In Hale's first patent, the water is introduced into the wheel at both sides: and the wheel there described differs from the plaintiff's only in the absence of the central disc or plate; it is carried by means of spokes instead. Hale's second patent *describes a machine [*734 having a central disc. And Ruthven's invention, although it proved delusive, had also all the qualities of the plaintiff's, with the exception of the central disc. And that the plaintiff claims only for the support of the wheel.

Collier, Q. C., and Chance, in support of the rule.—That which the plaintiff claims by his specification as it now stands, is, not merely the wheel, but the combination of the wheel with certain machinery described, whereby certain defects in a well-known machine,—a machine for raising water by centrifugal force,—are counteracted. This combination is confessedly new. Taking the specification with the disclaimers, it is distinctly pointed out that the only claim the plaintiff makes, is, for the application of machinery for raising water by centrifugal force, where the same is used for introducing the water into compressed air. [WILLES, J.—The plaintiff seems to have done successfully what Ruthven failed to do,—each using a wheel admitting the water at both sides. COCKBURN, C. J.—The whole question of novelty seems to turn upon Ruthven's patent.] That was for a mere blower. It is quite impossible that the plaintiff could have dreamt that that had any application to *his* invention: it was altogether *alio intuitu*: it was never meant to be applied to the raising of water. [WILLES, J.—Take away Ruthven's second and third wheels, and you have a wheel propelling water, into which wheel the water to be acted upon is admitted at both sides.] That undoubtedly is so; but the specification

filed by Ruthven clearly shows that he did not contemplate any such use of his wheel as the plaintiff suggests. [CRESSWELL, J.—I think you must go the length of contending that, after the plaintiff's patent, Ruthven could not have applied his invention to pumps.] It may be *785] that Ruthven's *invention is applicable to a purpose which he was not aware of; and for the discovery of that it may be that a third party could not take out a patent: but the application of a property of a substance (or, as it is conceived, a new application of machinery) to a purpose useful in itself, and not before known, may be the subject of a patent: *Muntz v. Foster*, 2 Webster's P. C. 96, 103. [*Hindmarch* referred to *Minter v. Mower*, 6 Ad. & E. 735 (E. C. L. R. vol. 38), 1 N. & P. 595. There, the specification of a patent described the invention to be of "an improvement in the construction, making, or manufacturing of chairs," and to consist in the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acted as a counter-balance to the pressure against the back, and whereby a person sitting in the chair might, by pressing against the back, cause it to take any inclination, and yet might be supported. In an action for infringing the patent, it was pleaded that the plaintiff was not the inventor, and that the specification did not describe the invention; and it was proved that a chair had previously been sold, to which a similar leverage was applied, acting by the pressure in the same way, but having also other machinery, which prevented the inclination of the back from being shifted except when a spring was touched by the hand. The jury found that, without such other machinery, the chair previously sold would have produced an equilibrium by the self-adjusting leverage; that the maker of it was the inventor of the machine, and found out the principle, but not the practical purpose to which it was now applied; and that the plaintiff had discovered such purpose. The court directed a nonsuit.] That is a totally different case: the plaintiff's alleged invention was substantially if not identically the same as Browne's. [CROWDER, J.—Ruthven, it *786] seems, was mistaken in supposing that he acquired an *increase of power by having three wheels: but, was there anything to prevent his using one?] In *Russell v. Cowley*, 1 C. M. & R. 864,† 1 Webster's P. C. 463, a patent was sustained for the mere omission of a maundril in the forming of iron pipes. [CRESSWELL, J.—And the substitution of external pressure in forcing the metal through a die.]

COCKBURN, C. J.—The strong impression of the court is, that Ruthven's patent is fatal to the plaintiff. We need not, therefore, at present hear counsel on the effect of Hale's patents.

By desire of the court the case was reargued in Easter Term last, upon the effect of Hale's second patent. *Cur. adv. vult.*

CRESSWELL, J., now delivered the judgment of the court:—

This was an action for the infringement of a patent. Several pleas were pleaded, on which issues were taken, and found for the plaintiff; and it is not necessary to notice them further. The two important pleas were, that the plaintiff was not the inventor of the alleged invention, and that the alleged invention was not new.

The cause was tried before Willes, J., without a jury: and he ordered the verdict on those two pleas to be entered for the defendant, giving the plaintiff leave to move to have the verdict entered in his favour, if the court should be of opinion that he was entitled to succeed in the action.

It appeared by the evidence adduced at the trial, that, in 1846, the plaintiff obtained a patent for an invention of "certain improvements in machinery for raising and impelling water and other liquids, *and also thereby to obtain mechanical power.*" These latter words were afterwards struck out, in pursuance of a disclaimer entered in 1853. [*737]

The specification, as originally enrolled, described minutely the parts of the machine for which the patent was granted, and which was a pump working by centrifugal force; and, in the course of that description, several things were claimed as the plaintiff's invention: but all those claims were afterwards abandoned. The part of the machine upon which this question arises was thus described:—"In the interior of the case *g g* is placed a hollow wheel, having hollow spokes or radial arms, of which *q q* are two; *r r* I call a nave, which is hollow; and *s s* are two hollow shafts, one at each side of the wheel." Further on was this passage: "In reference to the hollow wheel, I do not confine myself to the number or to the use of hollow spokes, but in some cases propose to substitute circular discs, with a narrow water channel between, and a valve or flexible valve or valves on the circumference, so as to have a channel or channels in the interior thereof for the passage of liquids, and adapted to neutralize the effects of suction, by having a corresponding or proportionate degree of suction at each side." It then went on thus:—"I shall now proceed to explain more particularly what I claim as my invention or inventions. I do not claim to be the discoverer that liquids may be raised by centrifugal force, nor do I claim in any way the sole application of machinery for raising water or other liquids by centrifugal force." He then introduced nine several distinct claims, the whole of which have since been disclaimed, save one; and the specification is now in these terms:—"I disclaim any exclusive right to wheels, whether consisting of hollow spokes or of a channel or channels between discs, when considered apart or separate from the machinery described." "I claim as *my invention and applica-* [*738]
tion the means of increasing the action of the machine by causing the liquid to enter the wheel at both sides."

This appears to us to be the only thing now claimed: and the ques-

tion which we have to determine, is, whether, according to the evidence, this alleged invention was new.

The defendant insisted at the trial that the plaintiff's claim was not new, but had been previously made known by a specification enrolled by one William Hale in 1830, and by another enrolled by one Morris West Ruthven in 1841. My Brother Willes was of opinion that the plaintiff's alleged invention had been previously disclosed by the specification enrolled by Ruthven, and the drawings annexed to it.

In Michaelmas Term, 1856, a rule nisi was obtained on the part of the plaintiff to enter a verdict for him, pursuant to the leave reserved.

The case was argued in Hilary Term last, and again, by desire of the court, in Easter Term, as to the effect of Hale's patent : and we are now of opinion, that, for anything communicated to the public by Hale, the plaintiff's claim may be good.

But, with regard to Ruthven's patent and specification, it appears, that, in 1841, a patent was granted to him for the invention of a new mode of increasing the power of certain media when acted upon by rotary fans or other similar apparatus. The machine invented, as described in his specification, consisted of three fans, with their appropriate cases. The air or other medium to be acted upon was admitted into the first, and, having been acted upon by the revolution of the fans, was driven from that into the second case, and in like manner into the third, thence to be projected, as the inventor expected, with an accumulation of force. One of the drawings annexed showed that
 *739] there was an "inner case revolving with its fans inside the outer case, and also that the air or water to be acted on and forced forwards was admitted equally at both sides. Another drawing of the inner case with its fans showed that there was an opening in the rim of the case at the front of each fan,—the fans in fact dividing the inner case into six compartments, or any other number, dependent, of course, on the number of fans. And this inner case so divided by fans, with the openings in the rim, and admitting water at both sides, was almost identical with the wheel used by the plaintiff, except that it had not a central disc, and was attached to the axle by spokes extending from the axle to the outer edge of the opening, for the admission of air or water.

Ruthven was mistaken in supposing that, by the use of three fans, he should obtain an increase of force ; and it did not appear that his machine was brought into use. And the question is, whether, notwithstanding the information given to the public by Ruthven's specification, the plaintiff can claim to be the first inventor of "the means of increasing the action of the machine by causing the liquid to enter the wheel at both sides."

The form of the wheel used by the plaintiff was not new, nor does he claim it as new ; nor was the plan of admitting water at both sides,

for the purpose of being projected forwards by centrifugal force, new,—it having been made known by the specification enrolled by Ruthven, and the drawings annexed to it. It may be true that the plaintiff first explained the full benefit obtained by so introducing it: but the discovery that a particular advantage was obtained by the use of a wheel known before, in a manner known before, cannot be called an invention or application to sustain a patent: *Losh v. Hague*, 1 Webster's P. C. 202, *Hindmarch on Patents*, 94. The method of introducing the water on *both sides, having been described by Ruthven, the plaintiff must be taken to have learnt that from him; and his claim must [740 be read as if he had mentioned that fact in his specification, and had said,—“I claim the means of increasing the action of the machine, by causing the water to enter the wheel at both sides, as described in Ruthven's drawings.” Could that have been held to be a new invention?

It appears to us, that, the raising and propelling of water by centrifugal force not being claimed as new, the wheel itself not being claimed as new, and the introduction of water at both sides of a *wheel*, in order to its propulsion by centrifugal force, being thus admitted not to be new,—the plaintiff could not be considered as the inventor of a method of increasing the action of the machine by so introducing it. We are, therefore, of opinion that the decision of the learned judge who tried the cause was right, and that this rule must be discharged.

Rule discharged.

TUFF v. WARMAN. June 9.

In an action for an injury to the plaintiff's vessel in consequence of a collision with a vessel under the control of the defendant,—there being conflicting evidence of negligence on the one side and on the other,—the jury were told, that, if the negligence or default of the plaintiff was in any degree the *direct* or *proximate* cause of the damage, he was not entitled to recover, however great might have been the negligence of the defendant: but that, if the negligence of the plaintiff was only *remotely* connected with the accident, then the question was whether the defendant might by the exercise of ordinary care have avoided it:—Held, a proper direction.

The Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, leaves the rule of law upon this subject as it was before; the only effect of the 296th and 298th sections being, to bring the non-compliance with the Admiralty sailing regulations within the category of negligence.

THIS was an action in which the defendant was charged with having so negligently navigated a steam-vessel in the river Thames as to run against and damage the barge of the plaintiff.

*The defendant pleaded,—first, not guilty,—secondly, that he [741 had not the control or management of the steamer.

The cause was tried before Willes, J., at the sittings in London after last Hilary Term. The facts were as follows:—The defendant was in charge of a steam-vessel called the *Celt*, as pilot, coming up the river,

some miles below Gravesend. The plaintiff's sailing-barge was proceeding with a fair wind down the river, having two men on board, one of whom was at the helm. It did not appear where the other was; but it was clear that they kept no look-out, for, the man at the helm stated that, the sail being in his way, he could not see forward without stooping, and he admitted, that, although he saw the steamer coming when a considerable distance off, he did not look out again until she was within two or three yards of him, and when it was too late to avoid the collision. The steamer, it appeared, was on her right side, according to the Admiralty regulations. The defendant stated that he was standing on the poop of the steamer, and saw the barge when about 300 yards distant, and immediately ported his helm; that, if the barge had done the same, the collision would have been avoided; that he thought the barge put her helm a-starboard; and that, finding a collision inevitable, he put his helm hard a-port, and backed his engines, but too late. The defendant's evidence was corroborated by that of the captain and the mate of the steamer. On the other hand, two seamen, who were on board a yawl, and who saw the whole transaction, distinctly swore that the steamer's helm was not ported.

On the part of the defendant, it was insisted that the plaintiff was not entitled to recover, inasmuch as he had failed to comply with the sailing regulations enforced by the statute 17 & 18 Vict. c. 104, ss. 296, *742] *297, 298;(a) and that, assuming that the defendant had been guilty of negligence, still, if there was any negligence on the part of the plaintiff, he could not maintain the action.

In leaving the case to the jury, the learned judge told them, that, if both parties were equally to blame, and the accident the result of their joint negligence, the plaintiff could not be entitled to recover;

(a) The 296th section enacts, that, "whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship, whether a steam or sailing ship, proceeding in another direction, so that, if both ships were to continue their respective courses, they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port, so as to pass on the port side of each other; and this rule shall be obeyed by all steam-ships and by all sailing-ships whether on the port or starboard tack, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of navigation, and, as regards sailing-ships on the starboard tack close-hauled, to the keeping such ships under command."

The 297th section enacts that "every steam-ship, when navigating any narrow channel, shall, whenever it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such steam-ship."

The 298th section enacts, that, "if, in any case of collision, it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any rule for the exhibition of lights or the use of fog-signals issued in pursuance of the powers heretofore contained (s. 295) or of the foregoing rule as to the passing of steam and sailing ships (s. 296) or of the foregoing rule as to a steam-ship keeping to that side of a narrow channel which lies on the starboard side (s. 297), the owner of the ship by which such rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary."

that, if *the negligence or default of the plaintiff was in any degree the proximate of the damage, he could not recover, how- [*743 ever great may have been the negligence of the defendant; but that, if the negligence of the plaintiff was only remotely connected with the accident, then the question was whether the defendant might not by the exercise of ordinary care have avoided it; that, as the people on board the plaintiff's barge were keeping no look-out, the defendant should have gone to starboard, or reversed his engines, and so avoided the collision: and he referred for an illustration to the case of *Davies v. Mann*, 10 Exch. 546;† and he concluded thus,—“Do you consider that the absence of a look-out was negligence on the part of the plaintiff? If so, you will consider whether it directly contributed to the accident. If you think that the plaintiff directly contributed to the accident, you will find for the defendant; but, if you think that the defendant by his negligence directly caused the injury, you must find for the plaintiff.”

The jury returned a verdict for the plaintiff, damages 106*l.*(a)

Collier, Q. C., in Easter Term last, obtained a rule nisi for a new trial on the ground of misdirection “on the subject of negligence,” and that the verdict was against evidence.

When the rule came on for argument, Crosswell, J., objected that the grounds upon which the rule had been granted were not so stated therein as to comply *with the 33d section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). [*744

Collier.—It was impossible to state shortly what was the particular objection to the summing-up of the learned judge. Error pervaded the whole of it, though the part which was the most objectionable was that in which the learned judge told the jury that, “if they were of opinion that the plaintiff by his own negligence *directly* contributed to the accident, they must find for the defendant; but that, if they thought that the defendant directly caused the injury, they must find for the plaintiff.” It was not properly a question of directly or indirectly contributing: as to the plaintiff's negligence, it is submitted that it was incorrect to put it to the jury to say whether it directly caused the accident; but, assuming that the defendant had been guilty of negligence, the proper question for them to consider, was, whether the plaintiff might not by the exercise of ordinary care have avoided the collision; for, to use the language of Lord Campbell's dictum in *Dowell v. The General Steam Navigation Company*, 5 Ellis & B. 195, 203, the plaintiff “cannot cast upon the defendant the necessity of taking extraordinary care.” See post, p. 751.

Honyman (with whom was *J. Wilde*, Q. C.) now showed cause.—The jury were directed in strict accordance with the rule laid down in all the

(a) Being the amount of the penalty of the bond given by the defendant, and the sum payable to him for pilotage in respect of the voyage on which he was engaged at the time as pilot. See 17 & 18 Vict. c. 104, s. 387.

cases upon this subject. The statute 17 & 18 Vict. c. 104, has made no alteration in the law in this respect: it merely re-enacts what was the Admiralty rule before. In *Dowell v. The General Steam-Navigation Company*, 5 Ellis & B. 195 (E. C. L. R. vol. 85), it was held, that a plaintiff cannot recover at law for mischief done to his ship by its being struck by the defendant's ship, in consequence of the latter being *improperly managed, if it appear that the plaintiff's ship was *745] improperly managed, and that such improper management *directly* contributed in any degree to the accident, however much the defendant may also be in fault: though, if there be negligence on the part of the plaintiff only *remotely* connected with the accident, the question is, whether the defendant by ordinary care and skill might have avoided the accident. The statute 14 & 15 Vict. c. 79, s. 26, gave power to the Admiralty to make such regulations as they might think fit, requiring the exhibition of lights by steam or sailing vessels: s. 28 enacted, that, in case of a collision by two vessels, if it was occasioned by the non-observance of such rules, the owner of the vessel by which the rule had been infringed should not be entitled to recover for the damage, unless it appeared to the court that the circumstances justified a departure from the rule. The Admiralty made a regulation that "all sailing vessels when under sail, or being towed, approaching or being approached by any other vessel, should be bound to show, between sunset and sunrise, a bright light, in such a position as could be best seen by such vessel or vessels, and in sufficient time to avoid collision." The plaintiff, the owner of a sailing collier vessel, declared against the defendant, the owner of a steamer, for that, by negligence of the defendant, the steamer struck the collier, which was thereby run down and sunk. The defendant pleaded not guilty. It appeared at the trial that the collision took place on a dark night; that the collier had exhibited a light, but had withdrawn it two or three minutes before the collision, and was not visible to the steamer till within two or three of the collier's lengths off: but the plaintiff contended, that, if the steamer had been managed with ordinary care and skill, the accident would not have happened. The judge told the jury, that, if there was negligence on the part of *the plaintiff as well as the defendant which led to *746] the collision, the plaintiff could not recover, if the defendant could not have avoided the accident by care and skill; and that, supposing there was negligence on the part of the collier, still, if the steamer could by ordinary care and skill have avoided the collision, the defendant would be answerable. He then asked the jury,—1. Was there negligence on the part of the plaintiff with respect to the light, which led to the collision? 2. Could the defendant have avoided the collision by ordinary care and skill? 3. Was the damage occasioned by the accident the result of circumstances for which more blame attached to the one side than the other? The jury answered,—1.

"We find there was fault on the part of the collier in not continuing the light till the danger was past." 2. "It is the opinion of the jury that the steamer was going at too great a speed on so dark a night, in which respect there was want of caution; but that it was impossible to avoid the accident when the steamer was within two or three of the collier's lengths." 3. "We are much inclined to think the preponderance of blame to be with the steamer." The court held that the defendant was entitled to the verdict; for, that the first answer, connected with the direction and question, must be understood as a finding that the discontinuance of the light led to the collision, which precluded the plaintiff from recovering, both at common law and under s. 28 of the statute,—the Admiralty regulation, upon a true construction, requiring that the sailing vessel should show the light for a reasonable time, and it not being necessary to plead the statute and regulation specially, the statute giving only a rule of evidence; and that the second and third answers strengthened the conclusion in favour of the defendant, as showing that the discontinuance of the light made it impossible to avoid the accident *after the collier became visible, and it [747 being therefore immaterial which party was on the whole most to blame. In giving judgment, Lord Campbell says: "By the answer to the first question, we consider the jury to have found that the master of the collier did not properly observe the regulation of the Admiralty made under the authority of the statute 14 & 15 Vict. c. 79, s. 26." "We likewise think that the jury must be taken to have found that this fault led to the collision. If it was a proximate cause of the collision, however much the steamer might be in fault, this action cannot be maintained. According to the rule which prevails in the Court of Admiralty, in a case of collision, if both vessels are in fault, the loss is equally divided: but, in a court of common law, the plaintiff has no remedy if his negligence *in any degree contributed* to the accident. In some cases there may have been negligence on the part of a plaintiff *remotely* connected with the accident; and, in these cases, the question arises, whether the defendant by the exercise of ordinary care and skill might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often-quoted donkey case, *Davies v. Mann*, 10 M. & W. 546.† There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident, within the rule upon this subject: and, if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he and he only proximately causing the loss. But, in the present case, the jury appear to have concluded (as they well might have done upon the evidence) that the negligence of the master of the collier, in not properly complying with the Admiralty regulation, *directly* contributed to the accident, although there was negligence on

*748] the other *side, and 'the preponderance of blame' was 'with the steamer.' " [WILLIAMS, J.—The court there seem to treat it as a question for the jury whether there was negligence or not.] It is not possible to use words more closely following the rule laid down by the Court of Queen's Bench in that case than the learned judge here did. [CRESSWELL, J.—Suppose the plaintiff had seen the steamer coming, and had notwithstanding persisted in steering in the same direction, would he have been guilty of negligence?] No doubt he would. [CRESSWELL, J.—Suppose he was guilty of another default, that of omitting to keep a proper look-out, would the plaintiff have directly contributed to the accident?] The question at present is, not whether the verdict was warranted by the evidence, but whether the direction was right. [COCKBURN, C. J.—Where the duty of one navigating a vessel is expressly pointed out by an act of parliament, and he neglects to pursue it, and in consequence his vessel is run into, can it be said that he does not contribute to the accident? WILLES, J., referred to *Smith v. Voss*, 2 Hurlst. & N. 97.† COCKBURN, C. J.—Why should we depart from the words of the act of parliament? The language of the 298th section is, that, "if in any case of collision it appears to the court that such collision was *occasioned* by the non-observance of any rule," &c., the owner shall not be entitled to recover any recompense for any damage sustained by such ship in such collision. The legislature may have thought it so important that these rules should be observed, as to impose these consequences for their non-observance.] If that strict construction be adopted, it will equally apply to the case of an injury wilfully inflicted: and it can hardly be contended, that, because the plaintiff has been guilty of *some* negligence in omitting to comply with the requirements of the statute, the defendant *749] might run him down with impunity. The *other point which it is insisted ought to have been left to the jury,—whether, assuming that there was some negligence on the part of the plaintiff, the defendant might by exercising ordinary care and skill have avoided the collision,—was in effect left to them. And the finding of the jury was abundantly warranted by the evidence.

Collier and Digby Seymour, in support of the rule.—The importance attached by the legislature to the observance of the rules enforced by s. 296 of the Merchant Shipping Act, 1854, is shown by the 299th section, which enacts, that "in case any damage to person or property arises from the non-observance by any ship of any of the said rules, ~~such damage~~ shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of such ship at the time, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary." The want of a look-out on board the barge, and the omission to port her helm on the approach of the *Celt*, were, if not the immediate cause of the accident, mainly in-

strumental or conducive to it. Is a man to be in a better position because he is so reckless as to keep no look-out, than he would have been in if he had complied with the regulations and been guilty of a mere error in judgment? That would be holding out a premium for negligence. In *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 244,† Parke, B., says: "The rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*, 11 East, 60; and that rule is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if by *ordinary care he might have avoided them, he is the author of his own wrong." [CRESSWELL, J.— [*750 Have you found the doctrine of *Butterfield v. Forrester*,—which was the case of a nuisance or obstruction on a highway,—applied to a case of *active* negligence on the part of the plaintiff?] It was extended to a case like the present in *Thorogood v. Bryan*, 8 C. B. 115 (E. C. L. R. vol. 65), where it was held that one who sustains an injury from a collision with a carriage or vessel, cannot maintain an action against the owners of such carriage or vessel, if negligence either on his part or on the part of those having the guidance of the carriage or vessel in which he is a passenger, *conduced* to the accident, and such injury might have been avoided by the exercise of reasonable care on his part or their part: Not a word is said there about the plaintiff's conduct *directly* or *indirectly* causing or contributing to the accident. [WILLIAMS, J.—That case has been made the subject of some damaging remarks in the last (4th) edition of Smith's Leading Cases, Vol. I., p. 220. (a)] In the course of the argument in *Dowell v. The General Steam Navigation *Company*, 5 Ellis & B. 195, 203 (E. C. L. R. vol. 85), it was suggested that "the mere fact that a plaintiff, [*751 who has been run over by the defendant, was on the wrong side of the way, does not necessarily give a defence: but if his being there was the immediate cause of the accident, then there is a defence." To this Lord Campbell assents, observing,—“He cannot cast on the defendant the necessity of taking extraordinary care.” The proper way of leaving the question to the jury here would have been, whether the defendant

(a) "If," says the learned editors, "two drunken stagecoachmen were to drive their respective carriages against each other and injure the passengers, each would have to bear the injury. to his own carriage, no doubt; but it seems highly unreasonable that each set of passengers should, by a fiction, be identified with the coachman who drove them, so as to be restricted for remedy to actions against their own driver or his employer. This, nevertheless, appears to be the result of the decision in *Thorogood v. Bryan*: but it may be questioned whether the reasoning of the court in that case is consistent with those of *Rigby v. Hewitt*, 5 Exch. 240,† and *Greenland v. Chaplin*, 5 Exch. 243,† or with the series of decisions from *Quarman v. Burnett*, 6 M. & W. 499,† to *Reddie v. The London and North Western Railway Company*, 4 Exch. 244.† Why in this particular case both the wrong-doers should not be considered liable to a person free from all blame, not answerable for the acts of either of them, and whom they have both injured, is a question which seems to deserve more consideration than it received in *Thorogood v. Bryan*."

could by the exercise of ordinary care have avoided the accident,—whether the plaintiff's negligence in any degree contributed to the injury; not whether it directly or indirectly caused or contributed to it. [COCKBURN, C. J.—Suppose the defendant saw the bargeman asleep at his helm, would he have been,—independently of the statute,—justified in keeping on his course and running into him? How does that case differ from that of a man falling asleep when driving, or of a drunken man lying on a highway?] He had no right to speculate on the bargeman's doing wrong. In the case of *The Mangerton*, 2 Jurist, N. S. 620, a sailing vessel not having ported her helm in sufficient time, and not having a light in accordance with the Admiralty regulations, was run into by a steamer: and it was held that the steamer was not to blame. Dr. Lushington there says: “Both parties are bound to act on the presumption that the statute must and will be obeyed. *The vessel approaching is justified in supposing that the other will obey the statute.*” [WILLIAMS, J., referred to the case of *The Mayor of Colchester v. Brooke*, 7 Q. B. *339 (E. C. L. R. vol. 53), where it *752] was held, that, if property (as oysters) be placed in the channel of a public navigable river so as to create a public nuisance, a person navigating is not justified in damaging such property by running his vessel against it, if he has room to pass without doing so; for an individual cannot abate a nuisance if he is no otherwise injured by it than as one of the public: and therefore the fact that such property (so placed) was a nuisance, is no excuse for running upon it negligently.] In *Morrison v. The General Steam-Navigation Company*, 8 Exch. 733,† it was held, that, where a vessel through sheer negligence injures another vessel by running her down at night, the mere fact that the injured vessel was at the time guilty of an infringement of the Admiralty regulations by not exhibiting a light, affords no justification under the act, where the absence of the light does not in *any way contribute* to the accident. That, it is submitted, is the correct view. *Vennell v. Garner*, 1 C. & M. 21,† seems very applicable here: it was there held, that, in case for running down a ship, neither party can recover when both are in the wrong; but the plaintiff may recover, although he might have prevented the collision, provided that he was in no degree in fault in not endeavouring to prevent it. Bayley, J., says: “The rule is, that the plaintiff could not recover, if his ship were in *any degree* in fault in not endeavouring to prevent the collision. Here, the plaintiff had a right to presume that the defendant's ship would do what she ought to do.” So, here, the defendant had a right to presume that the plaintiff would do what the statute requires him to do, and which it was his duty to, viz., to port his helm. The jury should have been directed as in *Smith v. Voss*, 1 Hurlst & N. 97,† and should have been asked to say whether the collision was in any degree caused by the negligence or breach of duty of the plaintiff. [COCKBURN;

*C. J.—Is not that involved in the question which *was* left to them, viz., whether the plaintiff by his negligence directly contributed to the accident?] The introduction of that word “directly” was calculated to embarrass and mislead the jury, and to withdraw their minds from the real question in issue. [COCKBURN, C. J.—Does not a man directly contribute to an accident, by putting himself by his own negligence in a position in which but for such negligence the accident would not have happened?] In some sense, no doubt, he does. Then, as to the evidence,—the finding that the plaintiff was not directly contributory to the accident, was clearly against all the evidence. It was admitted that he kept no look-out, and it was proved by all the witnesses that he did not port his helm. It is manifest, therefore, that he was guilty of gross negligence, and that that negligence must have contributed to the accident.(a)

COCKBURN, C. J.—I am of opinion that this rule should be discharged. As to the verdict being against the evidence, my Brother Willes, who tried the cause, reports to us not only that he was not dissatisfied with the conclusion the jury came to, but that he thinks the verdict was right: under these circumstances, therefore, the rule cannot be sustained on that ground. As to the other ground upon which this rule was moved, after much consideration I have satisfied myself that the direction of the learned judge was right. The first objection to the summing up is, that it was left to the jury to say whether the plaintiff had by his own negligence directly contributed to the result: and it was contended, that, looking at the 296th and 298th *sections of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, the [*754 case as to this part of it should have been left to the jury independently of the question of the plaintiff's having been contributory to the accident. At first, it struck me rather forcibly, that, the statute having prescribed that certain things shall be done and certain regulations followed, and then providing, that, in cases of collision, where it shall appear to the court that such collision was occasioned by the non-observance of those rules, the owner of the ship by which such rules have been infringed shall not be entitled to recover any recompense whatever for any damage sustained by the vessel from such collision, unless it be shown to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary,—prescribing these matters peremptorily and absolutely, and making provision for what shall be the consequence of a contravention of those regulations,—it was not a question whether their non-observance had caused or contributed to the accident, but that such non-observance was a matter upon the establishing of which the plaintiff's right to recover is absolutely precluded by the statute. Upon further consideration, however, and

(a) See the *General Steam Navigation Company v. Morrison*, 13 C. B. 581 (E. C. L. R. vol. 76), *The General Steam Navigation Company v. Mann*, 14 C. B. 127 (E. C. L. R. vol. 78).

upon the authority of the cases of *Morrison v. The General Steam Navigation Company*, 8 Exch. 733,† and *Dowell v. The General Steam Navigation Company*, 5 Ellis & B. 195 (E. C. L. R. vol. 85); I have felt myself constrained to come to a different conclusion. In the former of these cases, the Court of Exchequer distinctly lay it down that the regulations in question have effected no change in the law, but that all persons navigating vessels are bound to exercise ordinary care and vigilance just as before; and that, if it be clearly established that a vessel having no light has been run into by another vessel by sheer *755] carelessness and negligence in not keeping a proper look-out, *the party sustaining damage is entitled to compensation. That shows that all that the statute has done, is, to bring within the category of negligence the non-observance of the regulations prescribed by s. 296; and that, in the event of accident arising from such non-observance, the case stands precisely the same as it did before, and the question is to be tried by the ordinary rules. That being so, I think the direction was right, and that the true question in these cases, is, whether, the damage having been occasioned by the negligence of the defendant, the negligence of the plaintiff has directly contributed to it; and I think that, in this case, if the defendant could have made out negligence on the part of the plaintiff, that would have been an answer to the action. The way in which it was put on the part of the defendant was this, that, by his own negligence in omitting to keep any look-out, the plaintiff contributed to the accident. If that had been established to the satisfaction of the jury, the plaintiff would have been directly contributory, and the defendant would have been entitled to a verdict. That question *was* left to the jury, with such observations as suggested themselves to the learned judge. There being no misdirection, therefore, and the learned judge not being dissatisfied with the verdict, we see no ground for disturbing it.

CRESSWELL, J.—I am of the same opinion upon both points. As to the first point, there was much conflicting evidence; and I should have had great difficulty in saying whether the verdict was right or wrong. We are, however, in a great measure relieved from considering that, inasmuch as my Brother Willes reports to us that he does not disapprove of the verdict. As to the question of law, it seems that the learned judge, with reference to the alleged non-compliance with the *756] *Admiralty regulations, told the jury that the question was whether the plaintiff, by neglecting to comply with them, had directly contributed to the accident. That direction was objected to; and it was said that the proper question for the jury was, whether the negligence of the plaintiff was at all contributory to the accident, and that the proper test was whether by the exercise of ordinary care he might have avoided the collision. That matter is disposed of by the case of *Dowell v. The General Steam Navigation Company*, 5 Ellis &

B. 195 (E. C. L. R. vol. 85). Lord Campbell, speaking of *Davies v. Mann*, 10 M. & W. 546,† there says: "In some cases, there may have been negligence on the part of a plaintiff remotely connected with the accident, and in those cases the question arises whether the defendant by the exercise of ordinary care and skill might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often-quoted donkey case, *Davies v. Mann*. There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident, within the rule upon this subject: and, if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he, and he only, proximately causing the loss." So, here, without the negligence of the plaintiff in omitting to port his helm when he found a collision imminent, the accident possibly might not have happened: yet that negligence might not have contributed to the accident within the rule. After observing at some length upon the facts of the case, my Brother Willes, towards the close of his summing up, put it to the jury thus,— "Do you consider that the absence of a look-out was negligence on the part of the plaintiff? If so, you will consider whether it directly contributed *to the accident." And he concludes by telling them,— [*757 "If you think that the plaintiff directly contributed to the accident, you will find for the defendant: but, if you think the defendant by his negligence directly caused the injury, you must find for the plaintiff." Those are the terms of direction which have been upheld in many cases: and I see no reason for disturbing the verdict.

WILLIAMS, J.—I have arrived at the same conclusion, though not without considerable difficulty. With regard to the alleged misdirection, I must confess, after well considering the case of *Dowell v. The General Steam Navigation Company*, 5 Ellis & B. 195 (E. C. L. R. vol. 85), I am unable to distinguish the mode of directing the jury here from that which the Court of Queen's Bench sustained there. The law was there laid down, in conformity with several previous decisions, that, if the negligence or default of the plaintiff was in any degree the proximate cause of the damage, he cannot recover, however great may have been the negligence of the defendant: but that, if the negligence of the plaintiff was only remotely connected with the accident, then the question is whether the defendant might not by the exercise of ordinary care have avoided it. So far the doctrine of the cases is perfectly plain. But then comes the question, what is meant by the negligence of the plaintiff being proximately or directly contributory, or only remotely connected with the accident? And that is a question which must somehow or other be disposed of at the trial. I dissent entirely from the proposition urged by Mr. Collier, that the plaintiff is disen-

titled to recover if his negligence is either proximately or remotely connected with the accident. But I feel great difficulty in dealing with the question whether the negligence was proximate or remote : and I
 *758] *certainly feel great difficulty in getting rid of that question of law by leaving it to the jury. That, however, was the course adopted in the case of *Dowell v. The General Steam Navigation Company*, and followed by my Brother Willes upon this occasion. I will not attempt to controvert or dispute the propriety of that now, however much I may lament that the law is not on a more intelligible and satisfactory footing in this respect. It was further objected, that, when the matter came to be left to the jury, it should have been left to them to say whether they thought the defendant might by exercising ordinary care and diligence have avoided the accident. It seems to me that that was in effect left to them. As to the other ground of the rule, viz. that the verdict was against evidence, I place great reliance on my Brother Willes's opinion. He expresses himself satisfied with the conclusion the jury came to ; and I cannot say that I am dissatisfied.

WILLES, J., concurred.

Rule discharged.

Collier, for the defendant, asked leave to appeal.

Wilde, *contra*.—The point has already been expressly decided in the Court of Queen's Bench ; and, the damages being limited by law to 100*l.*, the case is hardly one in which the court would allow an appeal.

CRESWELL, J.—The amount of damages is not a matter to be taken into consideration.

*759] COCKBURN, C. J.—The point is one of great *importance, and one which has never yet been decided by a court of error. I think the defendant ought to be allowed to appeal.

Collier then asked leave to amend the rule.

COCKBURN, C. J.—Draw your points, and submit them to us, in order that we may see that they are involved in our judgment.

On a subsequent day, the following note of the proposed amendment was handed in :—

“That the learned judge had misdirected the jury in this, that he ought to have told them, that, if the plaintiff by his negligence contributed to the occasioning of the accident, he could not recover, whether he contributed directly or indirectly ; that, even assuming negligence on the defendant's part, the plaintiff could not recover if he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence : and that he should have further told the jury, that, if the plaintiff failed to comply with the statutory rule relative to porting his helm, whether his failure to do so arose from

his not looking out or from other causes, and such failure either directly or indirectly contributed to the collision, he could not recover."

Leave to appeal granted.

There can be no recovery for an injury even from the gross negligence of another, unless the plaintiff be free from culpable negligence on his part: *Bush v. Brainard*, 1 Cow. 78; *Law v. Crombie*, 12 Pick. 177. Nor if the wrongful act of the plaintiff co-operated with the misconduct of the defendant to produce the damage sustained: *Tonawanda Company v. Munger*, 5 Denio, 255; *Williams v. Michigan Central Railroad*, 2 Mich. 259. In an action for an injury to the plaintiff, resulting from the negligence of the defendant, the care required of the plaintiff is that degree of care which may be reasonably expected from one in his situation; that is, reasonable care; and if this degree of care be exercised by him, the want of a greater degree will not preclude him from a recovery for the negligence of the defendant: *Beers v. Housatonic Railroad Co.*, 19 Conn. 566. Although a child of tender years may be in the highway through the fault or negligence of his parents, and so be improperly there, yet if he be injured through the negligence of the defendant, he is not precluded from his redress. If the defendant know that such a person is in the highway, he is bound to a proportionate degree of watchfulness—to the utmost circumspection—and what would be but ordinary neglect in regard to a person of full age and capacity, would be gross neglect as to a child; *Robinson v. Coxe*, 22 Verm. 213

*LING v. CROKER. June 12.

[*760

Upon a motion for a new trial in an action of crim. con., on the ground of surprise,—*Scoble*, that the affidavit of the plaintiff's wife cannot be received for any purpose.

THIS was an action for criminal conversation, tried before Willes, J., at sittings at Westminster after last Hilary Term, when the jury returned a verdict for the plaintiff, damages 1000*l*.

Edwin James, Q. C., in Easter Term last, moved for a new trial, upon affidavits tending to impeach the propriety of the conclusion which the jury came to upon the subject of the handwriting of certain letters of a most disgusting character which were produced on the part of the defendant, and which were alleged to have been written by the plaintiff, whilst in the Crimea, to his wife; and also on the ground that the damages were excessive. [WILLES, J.—Have you any affidavit of surprise,—that the genuineness of the letters was disputed at the trial? I must confess I thought the evidence as to the handwriting was most unsatisfactory.] There is no affidavit of surprise according to the strict technical rule; but that can be supplied. The letters were, it seems, handed by the lady to the defendant's attorney as the genuine letters of her husband; and he had no reason to

doubt that they were so. We have also her affidavit on the subject [CRESSWELL, J.—We cannot look at the wife's affidavit.(a) WILLES, J.—The affidavits of the parties can at best only be received for the purpose of excluding conclusions.] If the wife's affidavit were offered for the purpose of a denial of the alleged adulterous intercourse, one could perceive the force of the objection: but here it relates to a collateral and independent fact. [CRESSWELL, J.—That can make no *761] *difference.] It is somewhat singular, that, in these cases, the law excludes the only persons who can give direct evidence. [COCKBURN, C. J.—It was thought expedient by the legislature to exclude them,(b) on the ground of the public scandal that would result from allowing them to be examined. Before we grant a rule on the ground of surprise, we must be satisfied that there are legitimate materials to justify a further investigation of the matter.] There is abundant evidence upon the affidavits which steers clear of the difficulty. The learned counsel read several affidavits.

COCKBURN, C. J.—I think sufficient ground has been shown to justify us in granting a rule; but there should be an affidavit of surprise, as well as an affidavit verifying the plaintiff's handwriting. As to the wife's affidavit, it must not be considered that we decide upon its admissibility on this occasion. It may be left open to discussion.

CRESSWELL, J.—As at present advised, I entertain a very strong opinion that neither the affidavit of the wife nor that of the defendant can be looked at for any purpose in cases of this sort.

COCKBURN, C. J.—At all events, they will not warrant us in granting a new trial, without other evidence.

E. James, Q. C., on a subsequent day, moved to postpone the argument, on the ground that the defendant would have to ask the court, when the rule came on, for leave to file affidavits in answer to the matters contained in the plaintiff's affidavits, under the 45th section of the *762] Common Law Procedure Act, 1854 (17 & *18 Vict. c. 125), and for that purpose it would be necessary to refer to the allegations in certain proceedings now pending in Doctors Commons, which would not be published until some time in July.

COCKBURN, C. J.—The only ground of the motion for a new trial, is, that the jury came to a wrong conclusion on the subject of the plaintiff's handwriting to certain letters. What you suggest may be a very good reason for postponing the trial, in the event of the rule being made absolute; but it certainly affords none for postponing the argument.

Upon cause being shown, it appeared that the defendant's attorney had had distinct notice before the trial that the plaintiff intended to

(a) See *Hawker v. Seal*, 17 C. B. 595 (E. C. L. R. vol. 84).

(b) See 14 & 15 Vict. c. 98, s. 3.

dispute the handwriting to the letters in question ; and exception was taken to the reception of the affidavit of the plaintiff's wife.

CRESSWELL, J.—I was no party to the reading of Mrs. Ling's affidavit in the rule : and I still entertain very grave doubts whether such an affidavit ought to be listened to for any purpose.

The whole court thought that the rule was answered.

Rule discharged.

*ATKYNs v. PEARCE. *June 12,* [*768

A. went abroad in 1852, leaving his wife and three children here, with (what the jury found to be) a sufficient provision for their proper maintenance in his absence : on his return, in 1856, he found that his wife had formed an adulterous connexion with another man, who lived with her, and passed by her husband's name, and he immediately removed his children :—Held, that, under these circumstances, A. was not liable for medicine and attendance furnished for his children at the wife's request, although the plaintiff was not aware of the state in which she was living at the time.

THIS was an action by the plaintiff, a surgeon and apothecary, to recover the amount of a bill for medical attendance upon the wife and children of the plaintiff from December, 1855, to September, 1856.

The cause was tried before the secondary of London on the 20th of May last. The facts which appeared in evidence were as follows :—The defendant left England in May, 1852, and went to Australia ; and he returned to England in April, 1856. When the defendant left this country, his wife remained here with three children : on his return, he found that his wife had during his absence formed an acquaintance with a man named French, with whom she was living at Hoxton, where he was known by the name of Pearce, and by whom she had had two more children. The defendant thereupon left her, taking away with him the three elder children.

The plaintiff's claim was made up partly of attendances on the wife in her two last confinements, and partly of charges for medicine and attendance upon the children ; but, at the trial, he abandoned the whole of his demand except that which related to attendances upon the three legitimate children.

Evidence was given on the part of the defendant to show that, during his absence from England, his aunt, who was his guardian and trustee, had at his request paid to his wife the rents of certain property to which he was entitled, the sums so paid to her in the whole amounting to 477*l.* : and it was submitted, on his behalf, that the allowance made to her in his absence, *and the wife's adultery, repelled the pre- [*764
sumption of agency, so as to make him responsible for her con-
tracts.

The secondary left it to the jury to say,—first, whether the allow-

ance was sufficient,—secondly, whether there was sufficient evidence of adultery. The jury found both these questions in the affirmative: and the secondary thereupon directed a verdict to be entered for the plaintiff for 7*l.* 10*s.* 8*d.*, the amount of the charge for attendances on the three legitimate children,—reserving leave to the defendant to move to enter a verdict for him, if the court should be of opinion that the plaintiff was not entitled to recover anything.

Pearce, on a former day in this term, obtained a rule nisi accordingly.

Raymond showed cause.—The wife is the general agent of her husband to bind him by contracts for necessaries for herself and children: *Ruddock v. Marsh*, 1 Hurlst. & N. 601:† and this presumption is rather strengthened where he goes abroad leaving her here to take care of his children. [COCKBURN, C. J.—If she acts as such agent. CRESSWELL, J.—The plaintiff dealt with her as the wife of French. Supposing him to be her husband, did he not give credit to him?] It did not appear that the plaintiff ever saw French: nor was there the slightest pretence for suggesting that he was cognisant that the woman was living in a state of adultery, or that she had any allowance. There was, in truth, nothing to cut down the general presumption of agency. In *Chitty on Contracts*, 6th edit., p. 152, it is said: “A wife, with regard to certain contracts,—*e. g.*, such as relate to necessaries for her husband’s family,—is regarded *primâ facie* as possessed of a general authority, *765] arising from the duty and liability of the *husband to provide his wife and children with necessaries.”(a) And at p. 165, the learned author, treating of cases where the wife’s adultery will not afford a defence against a claim for necessaries, says: “Where it appeared that the defendant’s wife having committed adultery, he separated himself from her, but left her in his house with two children bearing his name, and without making any provision for her in consequence of the separation, and she continued to reside in the house in a state of adultery,—it was held that the husband was liable for necessaries furnished to her in the house in which she was so left with the children; it not appearing that the plaintiff knew, or might readily have known, the circumstances under which she was living:” *Norton v. Fazan*, 1 B. & P. 226. Eyre, C. J., in that case, says,—“If the defendant in another action brought against him by some other tradesman shall be able to establish the notoriety of his wife’s situation, he may defend himself. But, as the case stands at present, this woman appears to have been living in a house in which she was placed by the defendant himself, together with two children bearing the husband’s name, both of whom were born in wedlock. It is true that she had an adulterous intercourse with another man, but that was not found to be

(a) See per Lord Abinger, *Freestone v. Butcher*, 9 C. & P. 643, 647 (E. C. L. R. vol. 38), *Read v. Legard*, 6 Exch. 636,† and *Emmett v. Norton*, 8 C. & P. 506 (E. C. L. R. vol. 34).

known to this tradesman."(a) If the defendant had left his children under the care of a servant, such servant would have had authority to contract in his name for necessaries for their support. [COCKBURN, C. J.—Not if the servant was supplied,—as the jury found the wife was here,—with *ample means to furnish herself and the children with necessaries suitable to their station.] In *Ruddock v. Marsh*, the jury were told that it was no defence to the action that the defendant had regularly supplied his wife with money sufficient to have kept his house without running him into debt: and the court upheld that ruling. [CRESSWELL, J.—If that case is to be sustained, it must be upon the supposition that the wife was acting with the husband's cognisance. Here, the husband was abroad during all the time of the adulterous intercourse. WILLES, J.—Suppose the husband and wife living apart, and the husband gives the wife a competent allowance, and a tradesman supplies her with goods, is the husband liable?] Probably not. [COCKBURN, C. J.—Does not all the authority of the wife cease when she quits her husband's roof, and goes to live with another man? Is the adulteress still clothed with all the authority of a wife?] Suppose, instead of being left with the wife, the children had, as before suggested, been intrusted to the care of a servant or a governess, and she had misconducted herself,—would the parent cease to be responsible for necessaries ordered by her? [COCKBURN, C. J.—That is a totally different question. The authority of the wife is derived from the conjugal relation. That tie severed, the authority ceases.] It cannot be supposed that the man intended his offspring to starve. Besides, here he admits his liability by offering a compromise. The distinction between a special and a general agency is well explained in *Story on Agency*, §§ 17, 126.

Pearce, in support of his rule, was stopped by the court.

COCKBURN, C. J.—I am of opinion that the rule to *enter a verdict for the defendant in this case must be made absolute. [*767 It appears that the defendant, having gone to Australia, left his wife with his three children in this country; that, in his absence, the wife formed an adulterous relation with another man, who assumed her husband's name, and lived with her; and that the plaintiff during that period provided medicine and attendance for the children, having no knowledge, and apparently no means of knowledge, of the state in which the wife was living. And the question is, whether under these circumstances she had authority to bind her husband. It seems to me that she had not. The fact of her living in a state of adultery divests her of all the authority which arises out of the marital relation. But it has been ingeniously put by Mr. *Raymond*, that, although the wife by her misconduct might have ceased to possess the general authority

(a) See *Addison on Contracts*, 4th edit. 709, where this case seems to be put upon the only ground upon which it is sustainable.

which arises from the conjugal relation, yet in this case she was clothed with a special authority as the agent of her husband to take care of his children, whom he was bound by every tie to provide for. But, if any such special authority could under such circumstances be implied, in the present case there arises this obstacle, viz., that no such authority was given, but that the only authority given by the husband was coupled with the allowance of a sum which the jury have found to be adequate for the supply of the children with all that was necessary for their proper maintenance. The authority was, not to pledge the credit of the husband for necessaries, but to support the children out of the fund provided for that purpose. As to the suggestion that the fund might fail, the answer is twofold,—either the case is one for which the law has not provided; or it may be that under such circumstances there might be an implied authority, but the case has not arisen. In the *768] absence of such *necessity, no such authority can be implied. In any view, therefore, the wife could have no authority to pledge the credit of her husband.

The rest of the court concurring,

Rule absolute.

DELANEY v. FOX. June 11.

The rule that a tenant is estopped from denying the title of his landlord is not confined to ejectment, as is suggested in *Watson v. Lane*, 11 Exch. 769.†

An eviction by title paramount puts an end to the estoppel: but, *consequenter*, that it must be an actual, and not a mere constructive, eviction.

THE first count of the declaration charged the defendant with having broken and entered a certain dwelling-house and premises of the plaintiff in Bradford, in the county of York, and forcibly expelled her therefrom. The second count set out certain proceedings under the Small Tenements Act, 1 & 2 Vict. c. 74, under which the alleged expulsion took place. The defendant pleaded,—first, *liberum tenementum*,—secondly, a special plea showing a tenancy of the plaintiff under him, and its determination by notice. See the pleadings, 1 C. B. N. S. 166 (E. C. L. R. vol. 87).

The cause was tried before Martin, B., at the last Spring Assizes at York. It appeared that the premises in question were in August, 1855, let by the defendant to the plaintiff at a weekly rent of 2s. 6d.; that the tenancy was duly determined by a notice to quit on the 17th of December, 1855; and that the plaintiff was turned out under an order obtained under the statute on the 1st of January, 1856. There was no evidence to show how the defendant became possessed of the premises.

*769] In answer to this *prima facie* case, the plaintiff gave *evidence (which was objected to, and admitted by the learned judge with

some doubt), that, at the time she was let into possession by the defendant he had no title, but that the real owner was one Ellen Knowles, who, in assertion of her right, had broken into a cellar, part of the same house, but let to another tenant, and to whom she, the plaintiff, under a threat of distress, paid rent for the premises.

At the close of the plaintiff's case, it was again objected that she was estopped from disputing the title of her landlord. The learned judge doubted whether the defendant should not have shown specially the relation between himself and the plaintiff; but he said, that, if the second plea had been pleaded to the first count, that would have put an end to the case. He thereupon directed a verdict to be entered for the plaintiff on the first count,—reserving leave to the defendant to move to enter the verdict for him upon that count, and to amend if necessary; and also reserving leave to the plaintiff to move to enter a verdict for her on the second count.

Knowles, in Easter Term last, obtained a rule nisi accordingly, “on the ground that the plaintiff was estopped from showing that the defendant had no title.” *Cleasby*, for the plaintiff (without a cross-rule), likewise obtained leave to enter a verdict for the plaintiff on the second issue. He submitted that there was that which was equivalent to an eviction, so as to destroy the estoppel, and put the matter at large,—Mrs. Knowles, who had lawful title, having entered upon the premises: and he referred to *The Mayor, &c., of Poole v. Whitt*, 15 M. & W. 571.†

Cleasby now showed cause.—The case must be looked at as if the first count and the plea of liberum *tenementum formed the whole record; and no estoppel can arise upon this issue. The [*770 defendant having given primâ facie evidence of title, the plaintiff was at liberty to meet that by showing that the property at that time really belonged to another. The estoppel only applies during the tenancy. Here, the tenancy had ceased. [WILLIAMS, J.—It would equally cease upon a disclaimer, or by breach of a condition in a lease.] The party could not take advantage of his own act. In Co. Litt. 47 b, it is said: “If a man take a lease for years of his own land by deed indented, the estoppel doth not continue after the term ended: for, by the making of the lease, the estoppel doth grow, and consequently by the end of the lease, the estoppel determines.” There is no estoppel at any time as to the particular estate, and no estoppel after the expiration of the term as to the title generally. [WILLIAMS, J.—I doubt whether this sort of estoppel, as now understood, where there is no deed, was known in the time of Lord Coke.] Whether the estoppel arises by matter in pais, or by deed indented, makes no difference. The estoppel never arises except in the action of ejectment. [CRESWELL, J.—Because it seldom happens that a man *expels* his tenant: he generally brings ejectment.] All that the tenant is estopped from denying, is, that the

landlord had title to the possession: but there is no estoppel as to the particular title he had. The estoppel is a strict thing: *Doe d. Higginbotham v. Barton*, 11 Ad. & E. 307 (E. C. L. R. vol. 39), 3 P. & D. 194. [WILLIAMS, J., referred to *Treport's Case*, 6 Co. Rep. 14 b.] Here, we showed the defendant's title put an end to by the act of Mrs. Knowles. [CRESSWELL, J.—His possession is not put an end to by the act of Mrs. Knowles. The possession is in you.] Lord Coke says,—Co. Litt. 323 a,—“Albeit the desseisor hath once gotten the attornment of the tenants, and payment of their rents, yet may they refuse *afterwards for avoiding of their double charge.” [WILLES, J.—*771] There was no evidence that the plaintiff was evicted by Mrs. Knowles.] Mrs. Knowles, claiming title, entered by breaking into the cellar. [WILLES, J.—The cellar was no part of the plaintiff's occupation.] It is clear that the plaintiff attorned to Mrs. Knowles, in order to prevent herself from being turned out. [WILLIAMS, J.—There was no threat of eviction by Mrs. Knowles, but merely a claim of rent.] In *Watson v. Lane*, 11 Exch. 769,† the defendant was tenant to the plaintiff (who was owner of the equity of redemption), under a lease whereby the defendant covenanted to deliver up to the plaintiff, at the expiration of the term, the premises and all fixtures therein: the term expired on the 1st of April, 1855; and, on the 10th, the plaintiff demanded possession, which was not given. On the 13th, the mortgagee gave notice to the defendant to pay the rent and deliver up the premises to him: the plaintiff having sued the defendant for a breach of his covenant in not delivering up the fixtures,—it was held that the defendant was not estopped from setting up the title of the mortgagee, and that the plaintiff could not recover the value of the fixtures, but only the actual damage sustained by him in consequence of their detention from the 10th to the 13th of April. Pollock, C. B., there says: “The question is, whether the plaintiff is entitled to recover the full value of the fixtures, or only such damage as he has actually sustained. It is contended that the defendant has no right to diminish the claim by setting up the title of a third person. Now, the doctrine which does not permit the title of another person to be set up, is, I apprehend, peculiar to the action of ejectment. I do not say so without authority, for, *Ogle v. Atkinson*, 5 Taunt. 759 (E. C. L. R. vol. 1), 1 Marsh. 323 (E. C. L. R. vol. 4), expressly decided that a warehouseman who has received goods *772] on behalf of a consignee, may nevertheless refuse *to deliver them to him, if they are the property of another person. Heath, J., there said,—‘It is peculiar to the action of ejectment, that he who is intrusted with the possession of land must deliver it back to his lessor; but that rule extends to no other action.’ The main ground of that rule is, the extreme importance of possession, which lengthened out creates a title, and in a certain time an indefeasible right. The question then comes to this, what has the plaintiff lost?—for, to that extent

ne ought to be indemnified. The defendant's lease expired a few days before the mortgagee asserted his right. After the expiration of the lease, the plaintiff demanded possession of the premises. The defendant did not deliver up possession; but, before any action was brought, the mortgagee gave notice of his title, and required the rent to be paid to him. The defendant afterwards bought the fixtures; but that circumstance appears to me to make no difference, for, the question is one of principle. The defendant is in the same situation as if an ejectment had been brought, judgment obtained, and execution issued on the 13th of April, and he had been turned out of possession by title paramount. The estoppel on the tenant merely amounts to this, that he is estopped from disputing the title of his landlord to the extent of the interest granted by the lease, but he is not estopped when the lease has terminated." And Martin, B., says: "The defendant's lease having expired on the 1st of April, on the 10th the plaintiff demanded possession. If an action of ejectment had then been brought, the defendant would have had no defence against the plaintiff: but, upon the 13th of the same month, the mortgagee gave the defendant notice to pay the rent and deliver up possession of the premises to him." There is no authority that a landlord can enter after the expiration of a term without showing title. [COCKBURN, C. J.—You admit *that he may [*773 bring ejectment: that involves title.] That is a mere fiction. [COCKBURN, C. J.—You want to show that the landlord never had any estate at all, and so you get rid of the estoppel altogether. You admit that you could not do that in ejectment. Why should a different rule prevail, because here the tenant brings trespass against the landlord for acting in assertion of his title?] In *The Mayor, &c., of Poole v. Whitt*, 15 M. & W. 571, 577,† Pollock, C. B., says: "If a party having a good right to eject the occupier of demised premises, goes there and demands to exercise that right, and the tenant says, 'I will change the title under which I now hold, and will consent to hold under you,' that, according to good sense, is capable of being well pleaded as an expulsion." That is a sufficient authority to show, that, it having been clearly proved that Mrs. Knowles had title to enter and evict the plaintiff, what took place in point of law amounted to an eviction, so as to afford an answer to any action by the defendant. That being so, the court will hardly permit an amendment the effect of which would be to cast upon the plaintiff a totally different case.

Manisty and Brett, in support of the rule.—This is the case of a tenant who is seeking, in collusion with a third person, to call in question her landlord's title. The rule is clear, that the tenant is estopped from denying his landlord's title to demise, though he may show that his title has expired: and there is no pretence for saying that this doctrine is confined to ejectment: see the authorities collected in the notes to *The Duchess of Kingston's case*, 2 Smith's Leading Cases, 4th edit.

651 et seq., and the notes to *Veale v. Warner*, 1 Wms. Saund. 325, and to *Walton v. Waterhouse*, 2 Wms. Saund. 418. [COCKBURN, C. *774] J.—We only think it necessary to hear *you on the subject of the eviction.] There was no evidence whatever of an eviction. The cellar was no part of that which was let to the plaintiff. There was no evidence whatever to raise the question which was alluded to, but not decided, in *The Mayor, &c., of Poole v. Whitt*, 15 M. & W. 571.† [WILLIAMS, J.—In the notes to *Moss v. Gallimore* (Dougl. 279), in 2 Smith's Leading Cases, 4th edit. 479, it is said: "It should seem that the cases on this subject might be reconciled to ordinary principles without straining after any peculiar rule applicable to the case of mortgagor and mortgagee, by observing that a tenant of the mortgagor, whose tenancy has commenced since the mortgage, may in case of an eviction by the mortgagee, either actual or constructive (for instance, an attornment to him under threat of eviction, see *Doe d. Higginbotham v. Barton*, 11 Ad. & E. 307 (E. C. L. R. vol. 39), 3 P. & D. 194, *The Mayor, &c., of Poole v. Whitt*, 15 M. & W. 571†), dispute the mortgagor's title to either the land or the rent (which is no more than any tenant may do upon an eviction by title paramount)."] The principle, it is submitted, is, that the mortgagor has ceased to be entitled to receive the rents. [WILLES, J.—The mortgagor has an implied authority from the mortgagee to distrain, until the latter interferes by giving notice.] In *Doe d. Bullen v. Mills*, 2 Ad. & E. 17 (E. C. L. R. vol. 29), 4 N. & M. 25, it was held, that, if a tenant consents to give up possession to a party claiming by a title adverse to his own landlord, that party is estopped, as the tenant would have been, from disputing the landlord's title. [They were here stopped by the court.]

COCKBURN, C. J.—I am of opinion that this rule must be made absolute. I think the plaintiff was estopped from denying the title of the defendant, upon the common-law principle that one who derives possession of land under another shall not be permitted to question *his *775] right to give him possession. Mr. *Cleasby* has attempted to distinguish this from the cases where the question ordinarily arises, on the ground that it is not an action of ejectment, but of trespass; and he says that the estoppel is confined to the first-mentioned description of action,—for which he relies upon something which fell from Pollock, C. B., and Martin, B., in *Watson v. Lane*, 11 Exch. 769.† But that must be construed with reference to the particular circumstances of the case. The defendant had entered into a covenant to deliver up the premises at the end of the term, together with the fixtures, and the action was brought for not delivering up the fixtures. The court took a distinction between the right to recover possession of the premises, and the right to damages for breach of the covenant to deliver up the fixtures: and, with regard to what is there said by the Lord Chief Baron, he was evidently meaning to distinguish between an action for

the recovery of the land and an action for not delivering up the fixtures. Looking at it upon principle, I see no distinction in this respect between ejectment and trespass. If the landlord were suing in ejectment, it is clear that the tenant would be estopped from denying his title. So, here, the tenant having wrongfully held over after the expiration of the notice, the landlord avails himself of the statute to resume possession, and the tenant brings trespass: I do not see why the same principle should not apply. There can be no substantial difference between the landlord's asserting his title by bringing ejectment at the immediate expiration of the term, and his asserting it in defence of an action of trespass at a future period. On the other hand, it is true, that, though the tenant is estopped from denying that his landlord ever had title, it is, nevertheless, competent to him to show that his title is determined; and that he may do in many ways, amongst others, by *showing an eviction, actual or constructive,—as is said in the case of *The Mayor, &c., of Poole v. Whitt*, 15 M. & W. 571.† It is, however, unnecessary to determine that here. But it is plain, that, to admit evidence of a constructive eviction, might operate seriously to the injury of the landlord; for, he might be deprived of an advantage which the law gives him, by his tenant's agreeing to attorn to another upon a mere threat of an ejectment. Here, there was nothing which can be construed as a constructive eviction, even if that would suffice, though, as at present advised, I think it would not. Mrs. Knowles, it is true, broke into the cellar; but that formed no part of the premises which were let to the plaintiff. And it appears that the whole proceedings in this action were without the active co-operation of the plaintiff, which are conducted by an attorney introduced by Mrs. Knowles.

CRESWELL, J.—I also think that the rule to enter a verdict for the defendant should be made absolute. I think there was sufficient evidence given to sustain the plea of *liberum tenementum*. It was proved that the defendant had let the plaintiff into possession; and that was a *prima facie* case of seisin in fee. As to the question of eviction, I entirely concur with the Lord Chief Justice, that the mere circumstance of the tenant's consenting to pay rent to Mrs. Knowles did not amount even to a constructive eviction. I also fully concur in the reasons he has assigned for doubting whether a constructive eviction can be considered as a determination of the landlord's title. An expression of opinion to that effect is thrown out by the Court of Exchequer in *Watson v. Lane*; but there was no decision upon the point.

WILLIAMS, J.—I am of the same opinion. It is firmly *estab-
lished by a long series of cases that a tenant cannot be permitted
to dispute the title of his landlord so long as that title continues. That
rule, however, is subject to this qualification, that the tenant may show
that the title has expired. *Doe d. Higginbotham v. Barton*, 11 Ad. &

E. 807 (E. C. L. R. vol. 39), 3 P. & D. 194, professes to have been decided as an example of that doctrine, though it may be doubted whether it fall within the rule or not. Reference has been made to the doctrine of constructive eviction. That is no departure from the rule above stated. It may be, that, if an eviction takes place, the tenant may dispute the landlord's title, because the possession which was given by him no longer continues. It is said that attornment may be treated as equivalent to eviction, inasmuch as it would be an idle ceremony for the tenant to walk out and then walk in again. I agree with my Lord Chief Justice and my Brother Cresswell that the facts of this case do not give rise to the application of the doctrine, if it be sustainable. The dictum of Heath, J., in *Ogle v. Atkinson*, has reference to chattels, and not to the possession of land.

WILLES, J.—I am of the same opinion. The defendant gave *prima facie* evidence of title. The plaintiff then proposed to displace that proof by showing that a third person had title to the freehold prior to the demise to her, and that consequently the defendant could not have the title he alleged in his plea. I apprehend the plaintiff was estopped from showing those facts, because they tend to impeach the title of the landlord at the time of the commencement of the demise. It is said, however, that the estoppel had ceased at the time of the entry. That is not quite so clear. Since the time referred to by Mr. *Cleasby*, it has been held that the estoppel continues so long as the *778] tenant remains in *possession. It is competent to the tenant to show that his landlord's title has expired: but that has not happened in this case. It is then said that there is another exception to the rule which precludes the tenant from disputing his landlord's title, viz., where the tenant has been evicted by title paramount. No such eviction was proved here. All that appears, is, that another person was evicted from the cellar, which was not demised to the plaintiff, and that the plaintiff, apprehending that she would be turned out, attorned to the person claiming title. I very much doubt that even an eviction, if proved, would be sufficient. The doctrine suggested in *The Mayor, &c., of Poole v. Whitt*, 15 M. & W. 571,† would, I apprehend, lead to great danger of collusion. As to the case of mortgagor and mortgagee, I regret that it has been treated by the courts of law differently from others. It is, however, too late now to set that right. I am clearly of opinion that there was an estoppel in this case, and that the defendant is entitled to the verdict upon the plea of *liberum tenementum*.
Rule absolute accordingly.

***ANDREWS v. BELFIELD. June 11. [779**

A. having applied to B., a coachmaker, to build for him a carriage of a particular description, the latter at his request sent him a drawing, which A. returned with objections. B. thereupon wrote to A., expressing his regret that the drawing sent did not meet his approbation, adding—"if you order, every attention shall be paid to any particulars you may think proper." A. in answer wrote,—"I have duly received your reply to my last, and can only continue to wonder at your disinclination to furnish me with so simple a drawing as I then requested, with the view of obviating as far as possible the chance of any misconception which might otherwise arise in respect to my order, which I can now of course give in general terms only, and on the assumption that you undertake to execute it in a manner which shall meet my approval, not only on the score of workmanship, but also that of convenience and taste." The carriage was thereupon built and forwarded to A., who found many faults in it, and rejected it:—Held, that the order having been given and accepted on the express condition that the carriage should meet the approval of A. "on the score of convenience and taste," the latter was entitled (acting bona fide, and not from mere caprice) to reject it.

THIS was an action for money payable by the defendant to the plaintiff for a carriage bargained and sold and sold and delivered, and for money found due upon an account stated. Plea, never indebted.

The cause was tried before Willes, J., at the last Spring Assizes for Surrey. The facts were as follows:—The plaintiff is a coachmaker carrying on an extensive business at Southampton. The defendant is a gentleman resident at Torquay. The action was brought to recover the sum of 93*l.*, the sum contracted to be paid by the defendant for a pony-phaeton built for him by the plaintiff under the following circumstances:—In August, 1855, the defendant called at the plaintiff's show-rooms at Southampton, and inspected some carriages, but, seeing none that he approved of, it was arranged that drawings should be sent to him. A drawing was accordingly submitted to the defendant, and returned with several objections. On the 15th of September, the plaintiff wrote to the defendant as follows:—

"Southampton, Sept. 15, 1855.

"Sir,—Yours with drawings enclosed came duly to hand this day. In reply to yours, I am quite sure you must know as well as myself that it is totally impossible, in making a drawing on a fiat surface, to correctly give the drawing to scale of a carriage, more especially *that of a phaeton, which is excessively round in the sides. The [780 best proof I can give of it is, that you complain that the drawing is too high: now, the height on which yourself and lady decided, on trial, was 2 ft. 3 in. You will find by a $\frac{1}{2}$ inch scale to the foot, the drawing is considerably lower than this, instead of higher, and the front wheel is the height wished, 2 ft. 2 in. The wing is drawn a little too long, which accounts for the objectionable appearance; and the head a trifle too long: but the carriage would be made from the general appearance of the drawing, adapted to the size of the horses and the other requirements of the party ordering. You ask what would be the difference in height when loaded. It is utterly impossible to answer this;

as it would of course depend on the load in it,—whether two, four, or six persons: but it would vary from two to four inches. A light hind skeleton rumble would, no doubt, look very light, and correspond very nicely with the front coach-box. The iron coach-box-stay would have been more correctly shown, had it been brought more like the pencil-marks: but the draughtsmen do not study these minor matters, well knowing that the coachmakers put them to rights in the practical carrying out of the design. The carriage can either be hung on the springs as shown in the drawing, or on elliptic springs, with equal ease; and the elliptic one rather the less complicated of the two. I believe I have now answered the whole of your queries, and can only add, that, should I be favoured with your kind order, I will endeavour to build you a handsome light carriage, suitable for the work required, and of the proper size for the horses.

“I remain, &c.

“RICHARD ANDREWS.”

On the 17th of September, the plaintiff again wrote as follows:—

*“Southampton, Sept. 17, 1855.

*781] “Sir,—I very much regret that the drawing sent does not seem to meet your approbation, as I sent expressly to London for it from the best carriage-draughtsman in England, and it was made expressly to meet your views. I am sorry that I cannot furnish you with anything better. If you order, *every attention shall be paid to any particulars you may think proper*, as to height of body from ground, height of wheels, &c., bearing in mind that the body will be about three inches higher than the wheel. The sitting in the rumble and the guard to the hind panel shall also be put, and *any other suggestions you may offer shall be executed in the best possible manner* consistent with the size of the horses and style of the carriage. You will please, in case you order, mark anything you think proper on the drawing, and return it to me. I remain, &c.,

“RICHARD ANDREWS.”

On the 26th, the defendant wrote to the plaintiff as follows:—

“Stoodleigh, Sept. 26, 1855.

“Sir,—I have duly received your reply to my last, and can only continue to wonder at your disinclination to furnish me with so simple a drawing as I then requested, with the view of obviating as far as possible the chance of any misconception which might otherwise arise in respect to my order, *which I can now of course give in general terms only, and on the assumption that you undertake to execute it in a manner which shall meet my approval, not only on the score of workmanship, but also that of convenience and taste.* Having premised thus much, I will state that the general style of the carriage shown in the

drawing originally sent by you, and now returned, meets my approbation, subject, however, to the correction of the faults in detail with *which it abounds, and to the modifications named before. The carriage is to be adapted to ponies 13.2 high; and the rumble [*782 should not be a box one, as shown, but a skeleton one, corresponding in some degree with the driving-seat. At the foot of the rumble should be also attached a *leather guard*, made in the manner of a dashing-leather, to protect the hinder panel of the carriage. Special attention must also be given to the position of the rumble, in reference to the head of the carriage, to obviate inconvenience in getting in and out when the head is down; and this without curtailing the head, so as to make it conveniently low for getting in and out of the carriage when it is up; and in this position the outline should not be much curved. It is also to be furnished with German shutters, which should be capable of being readily detached. The wheels are to be retained as nearly as possible of the height shown in the drawing. The body kept as near to the ground as practicable, and under no circumstances higher than shown. The driving-seat should be so arranged as to appear to be independent of, and not to be supported by, the dashing-leather; and the carriage is to be fitted with all needful appliances, including lamps and a patent drag, which last is to be so arranged as to admit of its being drawn up from either the body of the carriage or the driving-seat, at pleasure. The colour and the lining to be those already selected. I will also add as a suggestion the expediency of using elliptical hinder springs, in lieu of those shown. The above appears to me the only instructions which, in the absence of a correct drawing, I am able to give, and which I conclude from your letter are sufficient for your purpose, but which I shall be happy to give more in detail on every point which you may desire; and have only now to request that you will proceed with my order with as little delay *as may be, [*783 and for which I understand 93*l.* to be the credit price, and to include packing and all other items which are usually charged as extras. When you are ready for the crest, I will send it: and the drawing you will of course retain for reference, if required.

“Yours, &c.

“J. BELFIELD.”

A short time afterwards, the defendant sent the plaintiff a letter, without date, as follows:—

“Mitford Vicarage, Friday.

“Sir,—I have received the drawing of the carriage, on which I wish to make the following remarks:—Assuming the scale to be $\frac{1}{2}$ in. to the foot, it would appear to be higher from the ground than was proposed: but, as it is possibly shown in the position which it takes when unloaded, I should wish to know what is the intended height when loaded,

and what is the lowest point to which, with the present wheels, it can be kept down. The iron-work for the support of the driving-seat must be incorrectly shown, as it would seem to pass through the dashing-leather. The rumble requires a *leather guard* at the foot, which should come as high as the bottom of the cane, to prevent the panel being scratched by the foot: and the seat of the rumble would appear to be but nine inches at most from the head when down, and therefore almost impossible to sit in in that position. The back and end of the wing, as shown when the head is off, is very ugly; nor do I quite understand it, unless that portion of the back above the wing is movable, as it is not shown in the drawing with the head above it, which must project when down. The rumble also, as drawn, rather hangs back, which is the fault that I spoke of as being so common. Are the half springs shown at the back so good as whole springs? I should like also to see the *784] form of the head when open, as so much of the *character of a carriage depends on this. I do not mind the wheels being rather further apart, if that will facilitate any of the alterations to which I have alluded.

“Yours, &c.

“J. BELFIELD.

“P.S.—What would be the effect of an open rumble instead of a box one? Would it not make the carriage look lighter, and so balance it?”

The carriage was completed, and forwarded to the defendant on the 17th of March, 1856. On the 22d he wrote to the plaintiff, as follows:—

“Paignton, March 22, 1856.

“Sir,—The phaeton has arrived; and I am extremely sorry to be obliged to inform you that it proves to be neither in conformity with my order nor in accordance with the drawing furnished. Putting all minor matters of detail (which are numerous) aside, and waiving for the moment all question of taste, its size alone renders it wholly unsuitable to ponies of 12.2 high, for which, if you will see, it was especially ordered; added to which, I regret to perceive that scarcely a single instruction conveyed in that letter appears to have been attended to. How these mistakes, annoying, doubtless, to you, but tenfold more so to me, should have arisen, is not for me to conjecture. But I have, of course, no alternative than to return the carriage to you, which I presume you would desire that I should do by the same means as that by which it came, and which shall be done on receipt of your reply. And I have only to add that this most untoward circumstance only gives me additional reason to regret that I was not in the first instance furnished with a drawing on a scale, in accordance with my particular request, by which this most unfortunate result would have been wholly obviated.

“Yours, &c.

“J. BELFIELD.”

*In reply to this letter, the plaintiff reminded the defendant, that, in his letter of the 26th of September, he had stated the ponies to be 13.2 high, and not 12.2: and, after some angry correspondence, the present action was brought. It appeared that the size of the fore-wheels was 2ft. 1in., and that of the hind wheels 8 feet; and that, in lieu of the leather guard to the rumble, the plaintiff had put wood. [*785]

On the part of the defendant, it was insisted, that, according to the terms of the contract, the defendant had reserved to himself unqualified power to reject the carriage, if not built according to his taste, however capricious that might be, provided it was done *bonâ fide*.

For the plaintiff, it was submitted, that the defendant was bound to take the carriage if it was such as in the judgment of the jury no reasonable man ought to have objected to.

The learned judge (although he thought it a question for the court) asked the jury whether the intention of the parties was that the defendant should have the right to reject the carriage if not built in conformity with his taste, and whether it was one which a reasonable man ought to have objected to: and he referred to the case of *Dallman v. King*, 4 N. C. 105 (E. C. L. R. vol. 83), 5 Scott, 384: and further, he left it to the jury to say whether the mention of the leather guard in the defendant's second letter amounted to a condition, or was merely a suggestion.

The jury returned a verdict for the plaintiff, observing that they thought that the mention of the leather guard was matter of suggestion only.

The learned judge reserved leave to the defendant to move to enter a nonsuit, on the construction of the contract: and it was arranged that the plaintiff should take back the carriage at once, without prejudice, and that, in the event of the verdict standing, the damages should be reduced to 15*l*.—the costs to be taxed on the higher scale. [*786]

M. Smith, Q. C., in Easter Term last, accordingly obtained a rule nisi to enter a nonsuit, "on the ground that the defendant had the right to reject the carriage if it did not meet his approval on the score of convenience and taste, and, the carriage being rejected, the plaintiff was not entitled to recover;" or for a new trial on the ground of misdirection on the part of the learned judge "in leaving to the jury whether the terms in the letter that there should be a leather guard was a condition, or a suggestion only, enabling the plaintiff to substitute wood."

Edwin James, Q. C., and *Hawkins*, now showed cause.—The work having been executed as nearly as possible in exact compliance with the defendant's order, the defendant could have no right capriciously to reject it: and, whether or not the carriage was such as a reasonable man ought to have accepted, as well as what was the real meaning of the

letter as to the leather guard, were properly questions for the jury. [CRESSWELL, J.—What pretence is there for saying that the leather guard to the rumble was less a condition than any other part of the order? The defendant chose to have leather.] *Dallman v. King*, 4 N. C. 105 (E. C. L. R. vol. 38), 5 Scott, 384, is exactly in point. There, it was agreed that the lessee should spend 200*l.* in repairs, to be inspected and approved of by the lessor, and to be done in a substantial manner; the lessee to be allowed to retain the sum out of the first year's rent of the premises: and it was held, that the lessor's approval was not a condition precedent to the lessee's retaining the rent. Tindal, C. J., there said: "The gist of the agreement is, that the work *787] should be done in a substantial manner; the approval *of the lessor was added for the purpose of enabling him to ascertain that the work had been done. It never could have been intended that he should be allowed capriciously to withhold his approval; that would have been a condition which would go to the destruction of the thing granted, and, if so, according to the well-known rule, the thing granted would pass discharged of the condition." So, here, it never could have been intended that the defendant should be permitted capriciously to reject the carriage, though it should have been built in strict accordance with his directions, merely because of some slight deviation from what he chose to set up as his standard of elegance and taste.

M. Smith, Q. C., and *Karslake*, in support of the rule.—The defendant by his contract reserved to himself the power to reject the carriage, if, when finished, it did not meet his approval as well on the score of workmanship as of convenience and taste. However fastidious his taste might be, he had a right to reject the carriage, and that without assigning any reasons, provided he was acting *bonâ fide*. There is nothing illegal or unreasonable in such a contract, especially with reference to an article of luxury like a carriage. In *Taylor v. Brewer*, 1 M. & Selw. 290, the plaintiff had performed work for a committee, under a resolution entered into by them, "that any service to be rendered by him should be taken into consideration, and such remuneration be made as should be deemed right:" and it was held, that an action would not lie to recover a recompense for such work, the resolution importing that the committee were to judge whether any remuneration was due. And Bayley, J., said: "The fair meaning of the resolution is this, that it was to be in the brast of the committee whether he was to have anything, and, if anything, then how much." *788] The *same principle prevails in *Bryant v. Flight*, 5 M. & W. 114,† and *Grafton v. The Eastern Counties Railway Company*, 8 Exch. 701.† So, in *Milner v. Field*, 5 Exch. 829,† a building agreement contained a proviso that no instalment should be paid unless the plaintiff delivered to the defendant a certificate signed by the surveyor of the latter, that the works were performed according to the specifica-

tions; and it was held that the certificate was a condition precedent to the right to payment, and that the want of it was a good answer to the action. [WILLES, J.—A similar decision was come to by this court in *Morgan v. Birnie*, 9 Bingh. 672 (E. C. L. R. vol. 23), 3 M. & Scott, 76 (E. C. L. R. vol. 30).] In *Moffatt v. Dickson*, 18 C. B. 543, certain plans and drawings were to be prepared by the plaintiff, subject to the approval of a committee, and subsequently of the commissioners in lunacy and secretary of state, pursuant to the 8 & 9 Vict. c. 126; and it was held that the plaintiff was not entitled to recover anything until the drawings had been approved of by the several parties whose approval was by the statute required. Who but the defendant himself was to judge whether or not the carriage was built according to his taste? [WILLES, J.—The jury could only judge according to the general conventional rules of taste.] Precisely so. With respect to the latter branch of the rule, it clearly ought not to have been left to the jury to say whether the addition of the leather guard to the rumble was a condition or a mere suggestion; that was matter of construction for the judge.

CRESSWELL, J.(a)—I am of opinion that this rule should be made absolute to enter a nonsuit. The plaintiff's letter of the 17th of September, 1855, conclusively shows that down to that time no contract had been *made between him and the defendant. A drawing of a carriage had been made and submitted to the defendant, but the defendant did not approve of it. In that letter, the plaintiff writes:—"If you order, every attention shall be paid to any particulars you may think proper as to height of body from ground, height of wheels, &c." Down to this time, therefore, all was open. On the 26th, the defendant sends this reply:—"I have duly received your reply to my last, and can only continue to wonder at your disinclination to furnish me with so simple a drawing as I then requested, with a view of obviating, as far as possible, the chance of any misconception which might otherwise arise in respect to my order, which I can now of course give in general terms only, and on the assumption that you undertake to execute it in a manner which shall meet my approval, not only on the score of workmanship, but also that of convenience and taste." He then goes into details. Another drawing seems to have been afterwards sent to the defendant, and returned by him with further remarks and objections. Now, taking into consideration the fact that the plaintiff knew that the defendant was dissatisfied with the drawings, and that the order for the carriage was given only conditionally on its being executed in a manner which should meet the defendant's approval, "not only on the score of workmanship, but also that of convenience and taste," it seems to me, that, unless that conditional order was fulfilled by the delivery of a carriage which should be built in accordance with the taste and convenience of the defendant,—assuming always that the

(a) The Lord Chief Justice, for private reasons, took no part in the discussion.

defendant acted *bonâ fide*, and not capriciously,—the defendant was not bound to accept it. On that ground, therefore, I am of opinion that the rule should be made absolute.

*790] WILLIAMS, J.—I am of the same opinion. Upon *reading the correspondence between the parties, I cannot arrive at any other conclusion than that the plaintiff, when he consented to put the carriage in hand upon the terms of the defendant's letter of the 26th of September, was content to take upon himself the risk of producing a vehicle which should satisfy the somewhat nice and fastidious taste of the defendant, and that the latter should have the privilege of rejecting it if it did not please him.

WILLES, J.—I am of the same opinion. There was no evidence to show that the defendant's refusal to accept the carriage was other than *bonâ fide*. Upon further consideration, therefore, I think the order was conditional, and subject to its being executed in a manner which should be in conformity with the defendant's taste.

Rule absolute accordingly.

HOLMES v. ONION. June 6.

The defendant engaged the services of one S., a thatcher, for a certain period, at weekly wages, for the purpose of hiring him out to do thatching work for his profit. S. having during the period thatched some stacks of wheat, &c., for the plaintiff, for which work the defendant claimed and received payment:—Held, that the defendant was responsible to the plaintiff for injury to the wheat, &c., occasioned by the negligent manner in which S. did the work.

THE declaration stated that the plaintiff was possessed of certain stacks of wheat, &c., and, at the request of the defendant, employed him for certain reward to thatch the same, that the defendant undertook to thatch and did thatch the said stacks, and that the plaintiff paid him a reasonable reward in that behalf.

The defendant pleaded,—first, a denial of the retainer and of the defendant's undertaking,—secondly, that the defendant did not thatch the said stacks,—thirdly, that the plaintiff did not pay the said reward,—fourthly, not guilty; whereupon issue was joined.

*791] *The cause was tried before Pollock, C. B., at the last Cambridgeshire Assizes, when the following facts appeared in evidence:—The defendant, who was a harness-maker, hired one Simpkin, who was a skilful thatcher, to do for him such thatching as he could procure during a period of six weeks, paying him for his services 6s. per week besides his board and beer, and finding him medical attendance in case anything ailed him during such service; and also providing him with a pony and a boy to assist him, in the event of his being sent beyond three miles to work. Simpkin afterwards, and within the six weeks, engaged himself to thatch some wheat, barley, and oat stacks

for the plaintiff, the latter not knowing of his arrangement with the defendant. Simpkin, after having commenced the plaintiff's work, and drawing money from him on account, left it; and, the plaintiff meeting the defendant, the latter told him that Simpkin was his (the defendant's) man, and that, if he (Simpkin) did the thatching, he (the defendant) must be paid for it. At the plaintiff's request, the defendant sent another man, named Clemens, to assist in the thatching; and Simpkin afterwards went back and completed the stacks which he had begun. Both Simpkin and Clemens were paid by the defendant; and the defendant afterwards sent in a bill to the plaintiff for the work so done, and sued the plaintiff for it in the Newmarket county court, when the plaintiff paid the money into court, and the defendant afterwards took it out. The wheat and oats subsequently proving to be considerably damaged by wet, this action was brought.

At the close of the plaintiff's case, his Lordship was called upon to nonsuit him, on the ground that there was no evidence to go to the jury. This his Lordship declined to do.

Several witnesses were then called on the part of the *defendant, to show that the work had been properly done, but that the [792 damage had arisen from the improper building of the stacks, and the inferior quality of the steam supplied by the plaintiff for the thatching.

The case then went to the jury upon the question of damages, which they assessed at 5*l*. The Lord Chief Baron thereupon directed the verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter it for him for 5*l*.

O'Malley, Q. C., in Easter Term last, moved for a new trial, on the ground that the damages were insufficient, or failing that, to enter a verdict for the plaintiff for 5*l*., pursuant to the leave reserved at the trial. [CROWDER, J.—The case having gone to the jury with your assent, you are bound by their assessment of the damages. All you can ask, is, that a verdict may be entered for the plaintiff for the 5*l*.]

The rule was accordingly drawn up "to enter a verdict for the plaintiff for 5*l*., pursuant to leave reserved, on the ground that there was no evidence of the defendant's liability for negligence."

The Lord Chief Baron reported to the court, as follows:—

"It appeared to me that the plaintiff made his bargain to thrash with Simpkin, not with Onion, who claimed to be paid because Simpkin was taken from his service,—as, if a man were to hire a gentleman's coachman to drive, the gentleman would not be liable for his bad driving, if he was no party to the bargain or hiring; and his insisting on being paid for the man's leaving his service would not make a contract under which he would be liable for his bad driving. And I thought there was *no evidence* that the defendant was *so employed as to be responsible for the carelessness of Simpkin: and [793 I directed a nonsuit. But, if the court should be of opinion that the

evidence established that fact,—not if there was merely *some* evidence of it,—I reserved liberty to the plaintiff to move to enter a verdict for him for 5*l.*, the damages ultimately found by the jury. Any amendment is to be made that the court thinks ought to have been made at the trial."

David Keane now showed cause.—The defendant clearly is not responsible for the negligence of *Simpkin*. [CRESSWELL, J.—If the defendant bargained to do the work by his servant,—hiring him out for his profit,—he would be responsible.] The plaintiff selected this man to do the work. The case resembles that of *Chanter v. Hopkins*, 4 M. & W. 899,† where, on a sale of a specific ascertained chattel, the seller was held not to warrant it fit for the purpose for which it was brought. [CRESSWELL, J.—It is much more like the case of *Quarman v. Burnett*, 6 M. & W. 499,† which would seem to show that *Simpkin* would be the defendant's servant, and the defendant the person contracting with the plaintiff.] The result might have been different in that case, if the defendants had themselves selected the particular driver. [COCKBURN, C. J.—If I hire of a job-master a carriage and horses, and desire him to send a particular servant to drive them, is the job-master therefore absolved from all responsibility for any negligence his servant may be guilty of? Is he not bound to have reasonably competent persons to do his work?] No doubt, the defendant would be responsible if the plaintiff had not himself selected the hand to do the work. [CRESSWELL, J.—Suppose a man sends a valuable horse to a smith to be shod, and says to him, "Do not intrust the job to an inferior hand, but shoe *794] him yourself, or let your foreman do it," and the smith or his *foreman accordingly shoes the horse, and in doing it lames the horse,—is the smith not liable?] Possibly he would be: but that is hardly a parallel case.

Couch and *H. Mills*, in support of the rule.—It is clear upon the evidence that the defendant took upon himself the entire services of *Simpkin* for the six weeks, upon the chance of deriving a profit from his skill as a thatcher. Upon what pretext, therefore, can it be said that he is not responsible for the consequences of *Simpkin's* negligence? It clearly is no answer to say that he is not a thatcher. As well might any contractor who employs various tradesmen to do work under him, claim immunity against the consequences of their acts, because he does not profess to be a mason, or a bricklayer, or a carpenter. Besides, it is not the fair result of the evidence here that *Simpkin* was specially selected by the plaintiff; for, when he left the work unfinished, the defendant sent another man, *Clemens*, who was permitted to thatch some of the stacks. [They were here stopped by the court.]

COCKBURN, C. J.—I think it is very plain, looking at all the evidence together, that, although the plaintiff had originally employed *Simpkin* to do the thatching for him, *Simpkin* was at that time the

servant of the defendant, with whom he had entered into a contract under which the defendant was to have the benefit of his entire services for a period of six weeks. The defendant, on being made aware that Simpkin had agreed to thatch for the plaintiff, tells the latter that Simpkin is his man, and that, if he does the work for the plaintiff, he (the defendant) will expect to be paid for it. To this the plaintiff assents; and, in the result, the defendant is, by means of process of the county court, paid for the work. There is this further *circumstance, which is a strongly corroborative fact to show that [*795 the defendant had entered into a contract with the plaintiff to do the work by his servant, viz. that, Simpkin neglecting the work during its progress, and the plaintiff informing the defendant of it, the defendant sends him another man, whose services the plaintiff accepts, paying the defendant for them. Although true it is, that, where a man employing a tradesman selects a particular servant or workman to do the job, the master may be relieved from responsibility for the consequences of the man's incompetency, it is, I think, going too far to say that he is relieved from all responsibility if the servant is guilty of negligence. I am of opinion that the jury here were not only warranted in finding for the plaintiff, but that they would have done wrong if they had found the other way. I therefore think the rule should be made absolute.

CRESSWELL, J., concurred.

WILLIAMS, J.—I am entirely of the same opinion: and I desire only to add that I do not dissent from the law as laid down by the Lord Chief Baron, but only from his application of it to the facts of this case. He says: "If a man were to hire a gentleman's coachman to drive, the gentleman would not be liable for his bad driving, if he were no party to the bargain or hiring; and his insisting on being paid for the man's leaving his service, would not make a contract under which he would be liable for his bad driving." I entirely agree with that. But, to make the case thus put analogous to the present, the bargain should have been between Holmes and Simpkin, and not between Holmes and Onion.

WILLES, J., concurred.

*COCKBURN, C. J.—I agree with my Brother Williams, that, [*796 if the facts had been like those suggested in the case put by the Lord Chief Baron, they would have warranted a different conclusion.

Rule absolute.

In the Matter of an Action or Suit pending in the County Court of Lancashire holden at Liverpool, between F. S. HULL and Others and JOHN M'FARLANE and Others, Committee of Management of The Liverpool United Legal Friendly Burial Society. *June 4.*

The trustees of a burial society, who by the constitution of the society are not and cannot be members, are not "persons interested" within the meaning of the 41st section of the Friendly Societies Act, 18 & 19 Vict. c. 63, so as to enable them of their own accord to institute proceedings against the society in the county court, for the purpose of controlling them in the proposed alteration of their rules.

The county court having entertained such an application, this court issued a prohibition.

THE plaintiffs are the trustees of a society called The Liverpool United Legal Friendly Burial Society. The defendants,—all of whom were members of the society, and beneficially interested in the funds according to the rules thereof as ordinary members,—were the committee of management. The trustees were not and could not according to the rules of the society be members thereof, or have any interest therein save as trustees of the funds and property thereof.

The 116th rule provides for the mode of altering, amending, or rescinding the rules; and rule 111 prescribes the notices to be given for any meeting convened for that purpose, and requires that the substance of the proposals to be made at the meeting shall be specified in the notice: and the 105th rule requires that all meetings of the members shall be held in some convenient place in Liverpool.

The defendants, as the committee of management, conceiving that certain alterations and amendments of the rules would be beneficial to the society, in *conformity with the 111th rule, convened a *797] special general meeting, of which the following notice was duly advertised:—

"To the members of the Liverpool United Legal Friendly Burial Society.

"A special general meeting of the members of the society will be held in the Clarendon Rooms, South John Street, Liverpool, on Thursday, the 5th of March, 1857, at 3 o'clock in the afternoon, for the purpose of obtaining the consent of a majority of the members present at such meeting, to rescinding some of the presen' rules of the society, and to the making and passing certain new rules, and also for making and passing certain amendments and alterations in the present rules."

The notice then gave the numbers of the several rules proposed to be altered and amended, with what purported to be the substance of the proposed alterations and amendments, the numbers of the rules proposed to be expunged, and what purported to be the substance of ten proposed new rules.

A meeting was held according to the above notice, which was attended by a large body of the members of the society, when the alterations and

amendments were agreed to by a large majority; and the rules so altered and amended were afterwards submitted for approval to the registrar of friendly societies.

The plaintiffs thereupon commenced a suit against the defendants in the Liverpool County Court, the particulars of complaint wherein were as follows:—

“In the County Court of Lancashire holden at Liverpool.

“Between F. S. Hull, W. Rathbone, and T. Martin, plaintiffs,
and

John M'Farlane, C. J. Browne, J. H. Stanley, *B. [798
Roberts, T. Trewitt, J. Barry, W. Mudge, J. Pen-
nington, J. Marsh, J. Heron, T. Greenwood, and P. Cullen,
defendants.

“Issued under the Friendly Societies Act, 1855, 18 & 19 Vict. c. 63.

“The following are the particulars of the complaint of the above-named plaintiffs:—

“1. That the defendants are the committee of management of ‘The Liverpool United Legal Friendly Burial Society,’ the rules whereof have been duly certified under the 18 & 19 Vict. c. 63.

“2. That the plaintiffs are the trustees of the said society.

“3. That the 116th of the said rules provides ‘that no new rules shall be made, nor any of the rules herein contained, or hereinafter to be made, shall be amended, altered, or rescinded, unless with the consent of a majority of the members present at a general meeting of the society, called specially for that purpose.’

“4. That the 105th of the said rules provides, ‘All meetings of the members shall be held in some convenient place in the borough of Liverpool, subject to the rules in that behalf provided.’

“5. That the 111th of the said rules provides, ‘Notices of all meetings shall be conspicuously posted by placards through the borough, and shall be inserted in six at least of the Liverpool newspapers, commencing not later than one week before the day of meeting; and such notices shall (in case of special meetings) contain the substance of the proposals to be made thereat.’

“6. That the said society consists of from 30,000 to 40,000 members, who are principally working men, their wives and children; and the adults in benefit who are entitled and vote at public meetings of members number about 15,000.

“*7. That the defendants as such committee aforesaid, recently [799
called a special general meeting of members, to appoint a committee to alter the existing rules of the society, and to pass new ones, although no such committee could be appointed by virtue of the rules of the society.

“8. That the defendants afterwards called a special meeting of

members, to be held at the Clarendon Rooms, in Liverpool aforesaid, although the place is capable of holding one hundred persons only.

"9. That the plaintiffs protested against such meeting and the proposed alteration of the rules; but the defendants proceeded with the meeting, and submitted divers new rules and alterations, some whereof were contrary to law.

"10. That the defendants subsequently called another meeting at the same place, and certain alterations in the existing rules, and additions thereto, were passed by the persons then assembled; but the registrar has not certified the same.

"11. The plaintiffs charge that the notices calling the said meetings do not, nor does any one of them, contain the substance of the proposals to be made at the said meetings, within the meaning of the said 111th rule, and that the place of meeting aforesaid was not a 'convenient place,' within the meaning of the said 105th rule.

"12. That the defendants have improperly expended divers large sums of the society's money in and about the said meetings and amendments and alterations, for printing, advertising, deputations to London, and other things, and certain moneys are still owing in respect thereof.

"The plaintiffs seek an order of this honourable court, that the said meetings may be declared void, and of no effect,—that the defendants *800] may be restrained by the *injunction of this honourable court from procuring the certificate of the registrar of friendly societies in England that the proposed alterations and amendments are according to law, and from taking any steps or proceedings for procuring or obtaining such certificate, and from putting in force or acting upon the said alterations and amendments until the said 111th rule has been duly complied with in regard thereto,—that the defendants be ordered to pay to the plaintiffs as such trustees, and for the use of the said society, all such moneys as have been expended by the defendants out of the funds of the said society as aforesaid, and for this purpose, if necessary, that an account thereof may be taken,—and that they be restrained from paying out of the funds of the society the moneys still owing as aforesaid,—and that the defendants may be also ordered personally to bear their costs of and incidental to the present proceedings, and to pay the plaintiffs their costs out of pocket of and incidental thereto. The plaintiffs also seek such further or other relief as the circumstances of the case may require and this honourable court may please to grant."

The suit came on for trial before the judge of the county court, at the return of the summons, on the 21st of April last, when the defendants appeared by counsel, and objected to the jurisdiction of the said county court, to hear or determine the said cause; but such objection was overruled, and the hearing was proceeded with; and on the

30th of April the judge delivered judgment to the effect following.—He declared all the meetings in the bill of complaint mentioned illegal, and all the proceedings at the same null and void: he condemned the defendants to the payment forthwith of all costs of the action personally, and not to be reimbursed by the society: he ordered them to render an account to the court, within one *week, of all the [*801 moneys expended in calling the said meetings or incident there- to, and of the deputations to the registrar in London; and that the defendants should also within fourteen days pay into court an amount equal to the said expenditure, out of their own pockets, to abide the further order of the court; and, in default of compliance with the said order, or any part thereof, the defendants were all to be committed to the county gaol for two months.

There was no evidence adduced at the trial beyond the notice of the meetings before mentioned, and the alterations in the rules.

Upon an affidavit of the above facts, and stating that none of the defendants owed any money to the society, or had ever possessed themselves of any funds belonging thereto, and that the only remuneration for their loss of time and labour in attending the meetings and transacting the business of the society, was 2s. 6d. each per meeting; *that the plaintiffs had not, nor had any of them, any voice or vote in the making, altering, or rescinding of the rules of the said society, or any right or authority to interfere therein, nor had the plaintiffs, or any of them, any interest in the subject-matter thereof, and had no right to be present at the society's meetings, without leave*; that, in framing the notice of the intended meetings, the committee attended to the suggestions thereon of the registrar when the matter thereof was before him prior to the meeting of the 5th of March being called, and that the notice was prepared under the direction of the committee fairly, and with the bonâ fide intention of complying with the 111th rule, and that none of the members of the society were in any way misled by it, nor did the dissentients at the meeting object that the substance of the alterations intended had not been fully noticed therein,

*Brett moved for a prohibition, to enjoin the county court judge from further proceeding in the plaint.—The judge of the [*802 county court had no jurisdiction to entertain the complaint in question. By former Friendly Societies Acts, disputes between the society and any of its members were (10 G. 4, c. 56, s. 27) to be settled by reference to arbitrators, whose decisions were to be enforced by justices, or (9 & 10 Vict. c. 27, s. 15) by reference to the registrar. But now, by the 40th section of the 18 & 19 Vict. c. 63, it is enacted, that, "every dispute between any member or members of any society established under this act, or any of the acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and

the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties, without appeal: provided, that, where the rules of any society established under any of the acts hereby repealed, shall have directed disputes to be referred to justices, such disputes shall be referred to and decided by the county court, as hereinafter mentioned." And by s. 41 it is enacted that, "in all friendly societies established under this act, or any of the repealed acts, all applications for the removal of any trustee, or for any other relief, order, or direction, or for the settlement of disputes that may arise, or may have arisen in any society, the rules of which do not prescribe any other mode of settling such disputes, or to enforce the decision of any arbitrators, or to hear or determine any dispute, if no arbitrator shall have been appointed, or if no decision shall be made by the said arbitrators within forty days after application has been made by the member or person claiming through or under a member *803] or under the rules of the society, shall be made to the county court of the district within which the usual or principal place of business of the society shall be situate; and such court shall, *upon the application of any person interested in the matter*, entertain such application, and give such relief, and make such orders and directions in relation to the matter of such application, as hereinafter mentioned, or as may now be given or made by the Court of Chancery in respect either of its ordinary or its special or statutory jurisdiction; and the decision of such county court upon and in relation to such application as aforesaid shall not be subject to any appeal." The plaintiffs here are not *persons interested in the matter*: they are not members of, nor have they any interest in, the society: their functions are determined by s. 17. This is not a matter which constitutes one of their duties as trustees. Besides, they are not professing here to act for the whole society, but only for a party of its members against another party of its members. Further, it is submitted that the judge of the county court has exceeded his jurisdiction in decreeing that the defendants shall pay costs: there is nothing in the statute authorizing him to give costs. This is a matter that even a court of equity would not have entertained: it is a suit by trustees, who are strangers in interest, against their cestuis que trust. Besides, a court of equity would have had no power to declare the rules null and void: Clough v. Ratcliffe, 1 De Gex & S. 164. [WILLES, J.—I think that case has been overruled in a recent case where the Lords Justices held that a court of equity may entertain a suit merely to declare a will valid.] The order is also excessive in decreeing that the defendants shall pay out of their own pockets the expenses of the meetings and deputations to the registrar in London.

**Mellish* showed cause in the first instance.(a)—The jurisdiction of the county court depends upon the 40th and 41st sections of the 18 & 19 Vict. c. 68, the words of which are very large: it plainly was the intention of the legislature to give to the county court the entire jurisdiction which had before been exercised by the Court of Chancery. The real question is, whether the trustees are the proper parties to bring the suit. This is in substance a suit by the society against the committee of management. The 18th section of the act makes it the duty of the trustees to bring all actions or suits relating to the funds of the society: it enacts that "all real and personal estate whatsoever belonging to any such society established under this act, or any of the acts hereby repealed, *shall be vested* in such trustees for the time being, for the use and benefit of such society and the members thereof; and the real or personal estate of any branch of a society shall be vested in the trustees of such branch, and be under the control of such trustee or trustees, their respective executors or administrators, according to their respective claims and interest; and, upon the death or removal of any such trustee or trustees, the same shall vest in the succeeding trustee or trustees for the same estate and interest as the former trustee or trustees had therein, and subject to the same trusts, without any conveyance or assignment whatsoever, save and except in the case of stocks and securities in the public funds of Great Britain and Ireland, which shall be transferred into the name or names of such new trustee or trustees; and, in all actions or suits or indictments, or summary proceedings before magistrates, touching or concerning any such property, the same shall be stated to be the property of the person or persons for the time being holding the said office of trustee, in his or their proper name or names, as trustees of such society, without any further description." The 19th section is somewhat singularly worded: it enacts that "the trustee or trustees of any such society are hereby authorized to bring or defend, or cause to be brought or defended, any action, suit, or prosecution in any court of law or equity, touching or concerning the property, right, or claim to property of the society for which he or they are such trustee or trustees as aforesaid; and such trustee or trustees shall and may, in all cases concerning the real or personal property of such society, sue and be sued, plead and be impleaded, in any court of law or equity, in his or their proper name or names, as trustee or trustees of such society, without other description; and no such action, suit, or prosecution shall be discontinued, or shall abate by the death of such person, or his removal from the office of trustee, but the same shall and may be pro-

(a) The affidavit upon which cause was shown stated, among other things, that "the trustees had no interest in the society, save that they considered it their duty to watch and see that its funds were not improperly expended; and they believed that the moneys expended in and about the calling and holding of these meetings, and the deputations to London to see the Registrar, were illegally and improperly expended."

ceeded in by or against the succeeding trustee or trustees, as if such death or removal had not taken place; and such succeeding trustee or trustees shall pay or receive the like costs as if the action or suit or prosecution had been commenced in his or their name or names, for the benefit of or to be reimbursed from the funds of such society." [COCKBURN, C. J.—The 41st section evidently applies to a different class of persons from those mentioned in the 19th, viz., persons interested in the funds of the society.] The words "*any person interested in the matter,*" were manifestly inserted in the 41st section merely for the *806] purpose of preventing the necessity of joining *all* the members. The proposed new rules greatly increase the powers of the governing body, and diminish those of the society at large: and the judge of the county court came to the conclusion that there had been illegal expenditure of the funds of the society, and that further illegal expenditure thereof was threatened. [COCKBURN, C. J.—Would a court of equity have had power to declare the rules null and void?] It is submitted that it would. [COCKBURN, C. J.—The difficulty I feel is, that the trustees do not represent the society. It must be assumed that the general body of the society think the rules well changed; but that the trustees, qua trustees, think fit to object. The dissentient members have taken no steps in the matter. But the trustees ex mere motu seek to set aside what has been done by the meeting. They have no interest in the funds of the society.] They have a duty cast upon them to see that the funds are not misapplied. They have an interest also; for, they might be responsible for the illegal application. As to the costs, the county court judge clearly has a general power to award costs in all cases coming before him. [WILLIAMS, J.—Costs might have been awarded under the 13 & 14 Vict. c. 115, s. 22.]

Brett, in support of the application.—The trustees have no interest whatever in the disposition of the funds of the society. [COCKBURN, C. J.—Could the trustees justify the payment of moneys under new rules made in contravention of the former rules?] It would not be competent to any member of the society to question the propriety of the rules when certified and enrolled in pursuance of the statute.

COCKBURN, C. J.—I am not desirous of expressing any opinion of *807] my own in this case; for, though I entertain some doubt whether the trustees had not such an interest in the matter as to enable them to institute the proceedings, I find the rest of the court are of a different opinion; and my doubts are not so cogent as to induce me to desire that the matter should be delayed for more consideration.

CRESWELL, J.—I am of opinion that the rule for a prohibition should be made absolute. It appears that many provisions are introduced into the statute to facilitate the settlement of disputes amongst the members of the society. The trustees, no doubt, are actuated by the best motives. But it seems that a desire had arisen on the part of

a large body of the society to effect an alteration in its rules. By the constitution of the society, it appears, there could be no alteration without the consent of the majority of members present at a meeting convened in a particular way. Now, there is no suggestion that there is anything in the alteration which has been made, that is at all inconsistent with the purposes of the society: but it is said that the meetings, at which the alterations were proposed and assented to were held at inconvenient times and places. It does not, however, appear that any member of the society complains of the alterations, or apprehends any injury arising from them. But it seems that the trustees thought the society were not acting wisely in the course they were pursuing, and that, if a larger meeting had been convened, some of the members might possibly object. It does not appear even now that there is any objection on the part of any member of the society. There is no dispute between the society and any person interested, and therefore I think the judge of the county court was acting without jurisdiction, and that his order cannot be enforced.

*WILLIAMS, J.—I am of the same opinion. The question turns exclusively upon the 41st section of the 18 & 19 Vict. c. [*808 63. The 19th section (which is substantially copied from the previous acts) was merely introduced for the purpose of removing all difficulty as to who should be plaintiff or defendant in suits respecting choses in action of the society. It gives no additional force to the provision in s. 41. The last-mentioned section confines the jurisdiction of the county court to cases where the application is made by a "party interested" in the matter. The affidavits here show that the applicants are mere trustees of the society, not being members or having any pecuniary interest therein, nor being put in motion by any of the members. The question is, whether, under such circumstances, they can be said to be "persons interested" within the meaning of the statute. If it had appeared that there was any controversy between them and the members of the society as to their mode of dealing with its funds, that might have been a matter to be settled under s. 41. But it does not appear that there exists any such controversy: and the only question is, whether they are interested, from their mere position as trustees. If the trustees had not thought fit to interpose, the new rules would have been binding upon the society and upon them. The question is whether it was any part of their duty to interfere in the matter. It appears to me that it was not, and that they exceeded their province in instituting the proceedings in the county court, and therefore that the injunction should go.

WILLES, J.—I am of the same opinion. The 41st section of the 18 & 19 Vict. c. 63 makes it a condition precedent to the jurisdiction of the county court, that the proceedings should be instituted by a person

*809] interested in the matter." Now, the trustees clearly are *not interested personally: and they can only be interested for the society as trustees, when directed by the society to institute the suit. It is admitted here that they have proceeded entirely of their own head. I therefore think the judge of the county court had no authority to entertain the matter, and that the rule for a prohibition must be made absolute. Rule absolute.

JEWELL v. PARR. *June 12.*

A. sued B. upon two bills of exchange and a promissory note, and obtained a verdict, subject to a bill of exceptions. A venire de novo was awarded, and, upon the second trial, the evidence obtained by B. under a commission to Paris induced A. to abandon the second bill, and he had a verdict on the other bill and the note, subject to a second bill of exceptions. Proceedings were afterwards instituted in Chancery, which resulted in a decree or order that the bill of exceptions should be abandoned, and the second bill given up to B., and the cause retried, striking out the count upon that bill. Upon that trial B. succeeded:—Held, that, on the taxation of the costs at law, B. was not entitled to the costs of the commission as "costs in the cause,"—the evidence taken thereunder not being applicable to any part of the record as it then stood.

THIS was an action to recover the amount of two bills of exchange for 100*l.* each, dated respectively the 18th of December, 1848, and the 30th of November, 1849, both drawn by one J. F. Allen upon and accepted by the defendant, and payable respectively at three months after date, and also of a promissory note for 60*l.*, dated the 22d of August, 1848, drawn by the defendant payable to Allen, all endorsed by Allen to the plaintiff. The declaration contained three counts,—the first upon the promissory note, the second upon the bill dated the 18th of November, 1848, and the third upon the bill dated the 30th of November, 1849.

The cause was tried before Maule, J., at the second sitting in London in Easter Term, 1854, when a verdict was found for the plaintiff. A bill of exceptions having been tendered to the ruling of the learned *810] judge, which *resulted in a venire de novo, the cause came on for trial again before Jervis, C. J., at the sittings at Guildhall after Michaelmas Term, 1855, when, the evidence of one Laurier, taken under a commission at Paris, having been read, the plaintiff's counsel consented to a verdict being entered for the defendant as to the second count of the declaration; but he insisted that the defendant had failed to prove either of his pleas as to the first and third counts: and his Lordship directed a verdict to be entered for the defendant as to the second count, and for the plaintiff on the first and third counts.

A bill of exceptions was again tendered as to the ruling of the Lord Chief Justice so far as the same related to the first and third counts. In making up the record on that occasion, the plaintiff's costs were taxed and allowed at 118*l.* 8*s.*, and the defendant's costs of the issue

upon which he succeeded, including the costs of the commission, were taxed and allowed at 97l. 5s. 4d.

Before the arrival of the day appointed for argument of the bill of exceptions, an appeal in a suit depending in chancery,—which was instituted by the defendant, to restrain the plaintiff from proceeding at law upon the bills and note, and which came on for hearing before Vice-Chancellor Wood, who dismissed the bill with costs, except so far as related to the bill of the 18th of December, 1848, which he directed should be given up to the defendant's attorney,—came on to be heard before the Lords Justices; and on the 3d of June, 1856, the Lords Justices made an order that the petition of appeal should stand over until this action had been retried, upon certain terms, amongst others, that the declaration should be amended by striking out the second count, that the defendant should be at liberty to add a plea to raise any question as to the negotiability of bills when overdue, and that the proceedings upon the bill of exceptions should be abandoned.

*The record was accordingly amended, and a new plea (the sixth) added, founded upon the doctrine of *Charles v. Marsden*, [*811 1 Taunt. 224.

The cause came on for trial upon the record so amended, before Willes, J., at the sittings in London after Trinity Term, 1856, when a verdict was found for the defendant upon the issue joined on the sixth plea. The learned judge (by consent) directed the verdict to be entered for the plaintiff on the first, second, eighth, and ninth pleas, and for the defendant on the sixth; and the jury were discharged as to the third, fourth, fifth, and seventh pleas.

The appeal again came on to be heard before the Lords Justices on the 20th of February, 1857, when a decree was made in favour of the plaintiff in the suit (defendant at law), and that the plaintiff (at law) should not be allowed any costs in the action respecting the issues on the pleas denying Allen's endorsements, notwithstanding the same had been found in his favour, and that he should pay the plaintiff the costs of suit.

On going before the master to tax the costs of the action, it was objected, on the part of the plaintiff, that, the defendant having been allowed the costs of the commission to examine Laurier at Paris on the taxation of costs in January, 1856, and as such costs had been set off against the plaintiff's costs of that (second) trial, he was not entitled to have them again taxed; that the evidence taken under the commission was not applicable to the now state of the record, the defendant having on the last trial succeeded only upon an entirely new plea, not in any degree supported by such evidence.

The master was of opinion that the taxation of the costs of the trial of December, 1855, went for nothing, such taxation being a mere formal matter, necessary as a preliminary to the sealing of the bill of excep-

*812] tions, and *that the costs were now to be taxed as if no such former taxation had taken place, in the same manner as if a venire de novo had been awarded upon the argument in the court of error; but he held, that, as the evidence taken under the commission in his judgment had reference exclusively to the bill of exchange dated the 18th of December, 1848, which formed no part of the record as then before him, he could not allow the costs thereof, although equitably the defendant might be entitled to them; and, accordingly, the costs of the commission were disallowed solely on the ground of the evidence being inapplicable to the present state of the record.

Hayes, Serjt., on a former day in his term, obtained a rule nisi for a review of the taxation. He submitted that the expense of the commission would never have been incurred if the plaintiff had not sued upon the bill of the 18th of December, 1848, his claim on which was not abandoned until the second trial; that the defendant had by means of that evidence successfully defended himself against that claim; that the third trial might be considered as a new trial on the record in its amended state, and not a fresh action; and, consequently, that the costs of the commission must be taken to be costs in the cause.

Wood now showed cause.—The short answer to this application is, that the master had no power, upon the record as presented to him, to allow the defendant the costs of the commission, inasmuch as there was no issue to which it could be applicable. In *Curling v. Robertson*, 8 Scott, N. R. 288, 7 M. & G. 525 (E. C. L. R. vol. 49), 2 D. & L. 307, the costs of the examination of a witness upon interrogatories, which were not produced in evidence at the trial, were held to have been properly disallowed. The master could only look at the interrogatories to *818] see if the *evidence was relevant to any issue upon the record. Besides, these costs have already been taxed and allowed to the defendant as the costs of the issue on which he succeeded on the second trial. If he is placed in any difficulty, it is solely in consequence of his having abandoned his bill of exceptions.

Hayes, Serjt., in support of his rule.—In *Curling v. Robertson*, the interrogatories were not used. Here, the evidence was produced, and the plaintiff thereupon retired from the contest as to the second bill, to which that evidence applied. The taxation alluded to was a mere formal matter, for the purpose of perfecting the bill of exceptions. The costs of this commission were necessarily and properly incurred, and are costs in the cause, and as such the defendant is entitled to them. [COCKBURN, C. J.—It is clear that you are not entitled to the costs of the second trial. How do you take the costs of the commission out of that predicament?] They are costs in the cause. [COCKBURN, C. J.—On the same ground, you might call all the costs of the second trial costs in the cause. Instead of subpoenaing witnesses in support of your case, you send out a commission to Paris.] There is no analogy

between the costs of a commission and costs of witnesses. The costs of the commission are not ordinary costs of the trial. The legislature has made a special provision for them. The plaintiff ought not to be allowed to place himself in a better position by abandoning one of his counts than he would have been in if the record had gone down as it originally stood. [COCKBURN, C. J.—You should have interposed and asked to have these costs reserved to you as a matter of condition when before the Lords Justices. CRESSWELL, J.—The costs you claim were taxed and allowed to you as *costs of the issue* upon *which you [*814 succeeded on the second trial. By what magic do they now become *costs in the cause*?]

COCKBURN, C. J.—Brother *Hayes*, I think you are out of court.

The rest concurring,

Rule discharged.

END OF TRINITY TERM.

1890

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On motion for new trial.

Upon a motion for a new trial in an action of crim. con., on the ground of surprise,—*Scmble*, that the affidavit of the plaintiff's wife cannot be received for any purpose. *Ling v. Croker*, 760

AGREEMENT.

Construction of.

1. The declaration stated that the defendant, as executor of one J., was accustomed and liable to pay over under her will to one A. certain rents and moneys received by him under the will to the use of A., and that, in consideration that the plaintiff would advance moneys to A., the defendant promised to repay her any such sums as she might so advance, from and out of the first money which he (the defendant) should receive on account of A., to wit, out of the first moneys to be by him thereafter received on account of the aforesaid rents and moneys, as and when he should receive the same: Averment, that plaintiff afterwards advanced to A. moneys in the whole amounting to \$84. 8c., and A. thereupon gave her an authority to receive the amount from the defendant; that the defendant afterwards received 20% on account of the

said rents and moneys, and paid the same to the plaintiff, but afterwards, and before he received any more, purchased A.'s interest in the said rents and moneys, and took an assignment thereof, and thereby disabled himself from performing his contract with the plaintiff, and had ever since received the rents and moneys in his own right.

Plea, that, at the time of the purchase of A.'s interest, the defendant had no notice or knowledge that the plaintiff had advanced A. more than the 20% so paid by him to the plaintiff, or that A. had given the plaintiff an authority to receive any further sum:—

Held, that the plea was a sufficient answer to the declaration; for, that the defendant's promise did not attach until the authority was given, and A., by parting with his interest, deprived himself of the power to give such authority. *Horler v. Carpenter*, 56

2. The defendants hired sacks from the plaintiffs for the conveyance of grain on their railway, subject to certain regulations, amongst which were the following:—"2. The charges for the use of sacks will be $\frac{1}{4}$ d. per sack per journey when discharged at any of the company's stations on the company's line, or at their warehouses, or at warehouses or mills connected by rail with the company's line; and 1d. per sack when sent to foreign stations: 3. Demurrage of $\frac{1}{4}$ d. per sack per week will be charged after the expiration of fourteen days; the hire to commence from the time the sacks leave the station to be filled; the time allowed for filling and returning to the station to be seven days: 10. None of the company's sacks containing grain will be

allowed to leave any station (local or foreign), unless a guarantee is first obtained by the clerk in charge, from the consignee, that the grain will be immediately discharged, and the sacks returned the same day, and to the same station:—Held, that the company's claim for demurrage arose at the expiration of fourteen days from the *hire* of the sacks; and that the only person with whom there was any contract for demurrage was the *consignor*, by virtue of the 3d regulation; but that, by the operation of the 10th regulation, his liability ceased upon the company's permitting the sacks to get into the hands of the consignee, whether with or without a guarantee. *The Great Northern Railway Company v. Wyles*, 344

3. *Conditional order.*—A. having applied to B., a coachmaker, to build for him a carriage of a particular description, the latter at his request sent him a drawing, which A. returned with objections. B. thereupon wrote to A. expressing his regret that the drawing sent did not meet his approbation, adding—"If you order, every attention shall be paid to any particulars you may think proper." A. in answer wrote,—"I have duly received your reply to my last, and can only continue to wonder at your disinclination to furnish me with so simple a drawing as I then requested, with the view of obviating as far as possible the chance of any misconception which might otherwise arise in respect of my order, which I can now of course give in general terms only, and on the assumption that you undertake to execute it in a manner which shall meet my approval, not only on the score of workmanship, but also that of convenience and taste." The carriage was thereupon built and forwarded to A., who found many faults in it, and rejected it:—Held, that the order having been given and accepted on the express condition that the carriage should meet the approval of A. "on the score of convenience and taste," the latter was entitled (acting bona fide, and not from mere caprice) to reject it. *Andrews v. Belfield*, 779

4. *Market value.*—By a written contract, the plaintiffs agreed with the defendant to make for him a covering for a tent of very large dimensions, the canvas used to be equal to pattern, and of the market value of 11d. per yard, and the making to be charged at 5d. per yard; and it was agreed, that, if the market value of the canvas should be less than 11d. per yard, the amount (the difference) should be deducted:—Held, that "market value" meant the price in the market to an ordinary consumer, irrespective of the particular contract. *Orchard v. Simpson*, 399

5. *Warranty.*—A. agreed to sell to B. "a cargo of Arracan rice per Savera, now on her way to Akyab, via Australia; the cargo to consist

of fair average Nicorasi rice, the price of which is to be 11s. 6d. per cwt., with a fair allowance for Lalong or any other inferior description of rice (if any); but the seller engages to deliver what is shipped on his account and in conformity with his invoice. The buyer to have the option, agreeably with the terms of the charter-party, of discharging the rice at any good and safe port in the United Kingdom, or on the continent between Havre and Hamburgh, both inclusive. This contract to be void provided the above vessel makes the intermediate voyage between Akyab and Calcutta agreeably with the conditions of the charter-party. Payment to be made in cash on the arrival of the vessel at port of call, in full, less freight, at invoice net weights, &c., on handing the buyer bills of lading and charter-party, with the policies of insurance, endorsed to buyer, for full value, which are to be effected in London, with particular average in the usual way, free under 3 per cent. Should the vessel be lost, this contract to be null and void:—Held, a warranty on the part of A. to deliver a cargo consisting of "fair average Nicorasi rice," provided neither of the events occurred in which the contract was to be void. *Simond v. Braddon*, 324

6. *Goods "expected to arrive."*—A. contracted to sell to B. 1176 "bales" of gambier, now on passage from Singapore, and expected to arrive in London, viz. per Ravensraig, 305 bales, per Lady Agnes Duff, 365 bales:—Held, a warranty that the goods were on passage. *Gorrieon v. Perrin*, 681

7. *Quare*, as to the extent of the vendor's liability on a sale of goods "expected to arrive" by a particular ship, where goods of the description contracted to be sold do arrive, but are consigned to a third party? *Id.*

8. *Evidence to explain.*—Held, also, that evidence was admissible to shew, that, by the usage of the trade, a "bale" of gambier was understood to mean a package of a particular description; and that the contract was not satisfied by a tender of packages of a totally different size and description. *Id.*

And see *LETTERS PATENT*, 1-5.

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Contract with,—see *W&R*.

AMENDMENT.

Under the 232d section of the Common Law Procedure Act, 1852.

1. *Of writ under the Bills of Exchange Act, 1858.*—A writ issued under the Bills of Exchange Act, 1858, 18 & 19 Vict. c. 67, in a case which is not within the act,—the bill or note having become due and payable more than six months before,—may, by virtue of the 232d section of the Common Law Pro-

cedure Act, 1852, be amended, by turning it into a writ under the last-mentioned act.

Leigh v. Baker, 367

2. The defendant was, in May, 1856, served with a summons under the Bills of Exchange Act, 1856, for the recovery of principal and interest on a promissory note alleged to have been made by her testator in March, 1851, payable on demand. No appearance having been entered, judgment was signed, and execution issued. Nine months afterwards, the defendant moved to set aside the writ and subsequent proceedings, on the ground that they were coram non iudice and void, and also suggesting that the testator's signature to the note was a forgery. The court refused to set aside the writ, but allowed it to be amended, upon terms, by making it a specially endorsed writ under the 25th section of the Common Law Procedure Act, 1852. *Id.*

3. *Misjoinder of parties.*—The 37th section of the Common Law Procedure Act, 1852, which enables the court or a judge, in the case of the misjoinder of a defendant in an action on contract, to amend such misjoinder "as a variance at the trial," does not apply to a case where the party whose name is sought to be expunged has been joined, not by mistake or inadvertence, but designedly for the purpose of seeking to fix him with liability: and an application to amend under that section cannot be entertained after the verdict has been returned. *Wickens v. Steel,* 488

4. The 222d section does not apply to the case of a misjoinder of parties. *Id.*

ARBITRAMENT.

Compulsory reference under the 17 & 18 Vict. a. 125, s. 3.

Award, how enforced.—*Quære*, whether an award made upon a reference under the 3d section of the Common Law Procedure Act, 1854, is enforceable by attachment or order under the 1 & 2 Vict. c. 110, s. 18? *Talbot v. Fisher,* 471

ARREST.

Debt under 20l.

1. Where a writ of summons is specially endorsed under the 25th section of the Common Law Procedure Act, 1852, and judgment is signed for default of appearance, pursuant to s. 27, after payments made by the defendant on account, the plaintiff is not entitled to sign judgment for the sum endorsed upon the writ, but only for the balance remaining due after giving credit for the moneys paid. *Hodges v. Cullaghan,* 306
2. By a special endorsement under the above statute, the plaintiff claimed 34*l.* 11*s.* 7*d.* The defendant, after the issuing of the writ, and

before judgment, paid 25*l.* on account, and judgment was signed and execution issued for the full amount, but with a direction to the officer to take the balance only, and costs. The defendant having been arrested and detained under this writ, a judge at Chambers made an order to reduce the amount for which the judgment was signed to the proper sum, and to discharge the defendant from custody, in pursuance of the 7 & 8 Vict. c. 96, s. 57, the sum recovered not exceeding 20*l.*, exclusive of costs:—The court refused to rescind the order. *Id.*

3. The arrest took place on the 14th of August, and the application for the defendant's discharge was not made until the 11th of December:—Held, not too late. *Id.*

Privilege from,—see ATTORNEY, 1.

And see MALICIOUS ARREST. *See* *SHRIPP.*

ASSAULT.

See *son assault demerue.*

In an action for an assault, it is competent to the defendant to give evidence of an assault by the plaintiff, without a plea of son assault demerue. *Sykes v. Chapman,* 438

ASSURANCE.

See *INSURANCE.*

ATTACHMENT.

See *ARBITRAMENT.*

ATTORNEY.

Privilege from arrest.

1. An attorney, not engaged for either of the parties in a cause, but merely attending as the professional adviser of bail put in in the Lord Mayor's Court for the purpose of dissolving an attachment, is not privileged from arrest upon a ca. ca. while going to or returning from the registrar's office for that purpose. *Jones v. Marshall,* 615

Summary application against.

2. Excessive and extortionate charges in a bill of costs as between attorney and client, form no ground for a summary application against the attorney, in the absence of evidence of wilful fraud,—the suitor being sufficiently protected by the taxation of the bill. *Micus v. Lloyd,* 409
3. Nor is it any ground for calling upon the attorney to answer the matters, that he is unable to pay the amount found due from him to his client on such taxation. *Id.*

AUTHORITY.

See *AGREEMENT, 1.*

BANKRUPT.

Arrangement under 12 & 13 Vict. c. 106, s. 224.

1. *Form of Plea.*—A plea of arrangement under the 224th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), is not good, unless it shows on the face of it that the deed is for the distribution of the whole of the debtor's estate, and ensures for the benefit of all the creditors. *Bloomer v. Darks*, 185
2. And, *semble*, that the want of such averments in the plea is not supplied by the general allegation that "all matters and things were done and happened according to the said act to make the deed, and the said release therein contained, as effectual and obligatory in all respects upon the creditors, including the plaintiff, who did not sign the said deed, as if they had duly signed the same." *Ib.* [*See Tabor v. Edwards*, post, Vol. III.]

Certificate.

3. *To petitioning trader, under s. 221.*—A certificate granted by a commissioner in bankruptcy to a petitioning trader, under s. 221 of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, operates a discharge as to the debts of all persons who were creditors at the date of the petition, and who had notice of the several sittings of the court under it, and is not affected by the refusal of one creditor to receive the composition agreed on by the three-fifths. *Tindall v. Hibbard*, 199

Action by assignee.

4. The circumstance of an action having been brought by the assignees of a bankrupt without first obtaining the leave of the Court of Bankruptcy, pursuant to the 12 & 13 Vict. c. 106, s. 153, gives the court in which the action is brought no power to stay the proceedings on motion. *Lee v. Sangster*, 1
5. Nor can the absence of such leave be pleaded as a defence to the action. *Ib.*
6. Neither is it a ground of objection on the part of the defendant, that the name of the official assignee has been used without his consent. *Ib.*

Maliciously filing affidavit under 12 & 13 Vict. c. 106, ss. 78, 86.

7. In order to determine whether or not a plaintiff is liable to costs under the 86th section of the Bankrupt Law Consolidation Act, 1849, for having without reasonable or probable cause made an affidavit of debt to found a summons under s. 78, regard must be had to the surrounding circumstances and to the law, and not merely to the belief operating on his mind at the time. *Hopps v. Fenner*, 387

Filing judge's order under 12 & 13 Vict. c. 106, s. 197,—see JUDGE'S ORDER.

BARON AND FEME.

See HUSBAND AND WIFE.

BENEFIT SOCIETY,
See FRIENDLY SOCIETY.

BILLS OF EXCHANGE ACT, 1855.

Amendment of writ erroneously issued under.

1. A writ issued under the Bills of Exchange Act, 1855, 18 & 19 Vict. c. 67, in a case which is not within the act,—the bill or note having become due and payable more than six months before,—may, by virtue of the 222d section of the Common Law Procedure Act, 1852, be amended, by turning it into a writ under the last-mentioned act. *Leigh v. Baker*, 387
2. The defendant was, in May, 1854, served with a writ of summons under the Bills of Exchange Act, 1855, for the recovery of principal and interest on a promissory note alleged to have been made by her testator in March, 1851, payable on demand. No appearance having been entered, judgment was signed, and execution issued. Nine months afterwards, the defendant moved to set aside the writ and subsequent proceedings, on the ground that they were coram non jure and void, and also suggesting that the testator's signature to the note was a forgery. The court refused to set aside the writ, but allowed it to be amended, upon terms, by making it a specially endorsed writ under the 25th section of the Common Law Procedure Act, 1852. *Ib.*

BILLS OF LADING.

See SHIPPING, 1.

BOND.

Discharge of principal debtor.

- A discharge of the principal under the insolvent debtors act, 1 & 2 Vict. c. 110, does not exonerate him from the claim of a surety on a bond, in respect of payments subsequently made under it by the latter. *Emery v. Clark*, 489

BURIAL SOCIETY.

See FRIENDLY SOCIETY, 2.

CARRIER.

See RAILWAY COMPANY, 1.

CHARTER-PARTY.

See SHIPPING, 2. WAR.

CHECK.

Crossing.

1. The statute 19 & 20 Vict. c. 25, which makes a "crossed check" payable only to or through a banker, applies to the state of the instrument *at the time of its presentment*: and therefore the banker upon whom a check is drawn is justified in paying it otherwise than through another banker, if, when presented, it does not bear any crossing on the face of it. *Simmons v. Taylor*, 528
2. The crossing forms no part of the check itself, and consequently its erasure does not amount to a forgery. *Id.*

CHILDREN.

Duty of parent,—see HUSBAND AND WIFE, 3.

CLUB-POLICY.

See INSURANCE, 2.

COAL-CLUB.

See FRIENDLY SOCIETY, 1.

COLLISION.

See SHIPPING, 3-6.

COMMISSION.

To examine witnesses abroad,—see COSTS, 3.

COMMON CARRIERS.

See RAILWAY COMPANY, 1.

COMMON LAW PROCEDURE ACT, 1852.

Section 25. *Amendment*,—see AMENDMENT, 2.

Section 37. *Misjoinder of parties*.

1. The 37th section of the Common Law Procedure Act, 1852, which enables the court or a judge, in the case of the misjoinder of a defendant in an action on contract, to amend such misjoinder "as a variance at the trial," does not apply to a case where the party whose name is sought to be expunged has been joined, not by mistake or inadvertence, but designedly for the purpose of seeking to fix him with liability: and an application to amend under that section cannot be entertained after the verdict has been returned. *Wickens v. Steel*, 488
2. The 222d section does not apply to the case of a misjoinder of parties. *Id.*

Section 210. *Judgment and execution in effectment*.

3. A motion for leave to sign judgment and issue execution under the 210th section of the Common Law Procedure Act, 1852, may be

made to the court, and is absolute in the first instance. *Yousens v. Keen*, 384

Section 222. *Amendment*,—see AMENDMENT, 1, 4.

COMMON LAW PROCEDURE ACT, 1854.

Section 3. *Compulsory reference*.

1. *How enforced*.]—*Quare*, whether an award made upon a reference under the 3d section of the Common Law Procedure Act, 1854, is enforceable by attachment or order under the 1 & 2 Vict. c. 110, s. 18? *Talbot v. Fisher*, 471

Section 51. *Interrogatories*.

2. The court will not allow interrogatories (under the 17 & 18 Vict. c. 125, s. 51) the tendency of which is to discover how the plaintiff intends to shape his case, without furthering any case which the defendant has to set up. Neither will interrogatories be allowed for the purpose of contradicting a written document. *Moor v. Roberts*, 671

Section 82. *Injunction*,—see INJUNCTION.

COMPANIES CLAUSES CONSOLIDATION ACT, 1845.

See JOINT STOCK COMPANY.

COMPOSITION.

See BANKRUPT, 1, 2.

CONDITION.

See LETTERS PATENT, 1.

CONDITIONAL ORDER.

See AGREEMENT, 3.

CONTRACT.

See AGREEMENT.

COSTS.

Under s. 86 of the Bankrupt Act, 12 & 13 Vict. c. 106.

1. In order to determine whether or not a plaintiff is liable to costs under the 86th section of the Bankrupt Law Consolidation Act, 1849, for having without reasonable or probable cause made an affidavit of debt to found a summons under s. 78, regard must be had to the surrounding circumstances and to the law, and not merely to the belief operating on his mind at the time. *Hope v. Fenner*, 387

Order for, how enforced.

2. An action will not lie upon an interlocutory and collateral order for costs: the mode of enforcing them is by attachment in the court by which the order is made. *Sheehy v. The Professional Life Assurance Company*, 211

Of county court appeal,--see COUNTY COURT, 3.

Costs in the cause.

3. A. sued B. upon two bills of exchange and a promissory note, and obtained a verdict, subject to a bill of exceptions. A venire de novo was awarded, and, upon the second trial, the evidence obtained by B. under a commission to Paris induced A. to abandon the second bill, and he had a verdict on the other bill and the note, subject to a second bill of exceptions. Proceedings were afterwards instituted in Chancery, which resulted in a decree or order that the bill of exceptions should be abandoned, and the second bill given up to B., and the cause retried, striking out the count upon that bill. Upon that trial B. succeeded:—Held, that, on the taxation of the costs at law, B. was not entitled to the costs of the commission as “costs in the cause,”—the evidence taken thereunder not being applicable to any part of the record as it then stood. *Jewell v. Parr*, 809

COUNTY COURT.

Jurisdiction of.

1. Under 18 & 19 Vict. c. 63, s. 41.]—The trustees of a benefit burial society, who by the constitution of the society are not and cannot be members thereof, are not “persons interested” within the meaning of the 41st section of the 18 & 19 Vict. c. 63, so as to enable them of their own accord to institute proceedings against the society in the county court, for the purpose of controlling the society in the proposed alteration of their rules. *Hull v. McFarlane*, 796
2. The county court having entertained such an application, this court issued a prohibition. *Ib.*

Statement of case on appeal.

3. *Costs.*]—A county court judge having stated a case (upon appeal) in so confused a manner that the court could not discover whether or not he meant to present a question of law for their decision, the case was remitted to him for amendment in this respect. Upon case coming back, it clearly appeared to involve no question of law. The court, under the circumstances, dismissed the appeal, without costs. *The London and North Western Railway Company, Appellants, Grace, Respondent*, 855

COVENANT.

Construction of.

Implied covenants.]—An agreement was entered into between the corporation of Harwich and B., a contractor for works, whereby the corporation agreed to let to B. the making, constructing, and completing certain works

which they were empowered by an act of parliament to make, according to a specification and plans annexed, at or for the sum of 12,505*l.*, and “on the conditions and in manner thereafter mentioned:” and B. agreed to take the said works and complete the same in manner set forth in the specification, and for the sums and subject to the provisions thereafter mentioned. The agreement then went on to provide that B. should construct certain of the works, described in the specification as the “first portion” thereof, for 7318*l.*, to be paid as in the specification mentioned; and that he should also construct the “second portion,” as described, for 4967*l.*, subject to the following provisions, that is to say,—“that the assent of the commissioners of woods and forests shall be given to the said mayor, &c., to carry out the said last-mentioned works, so far as the same affect the land or soil, &c., of the crown,—and that the said mayor, &c., are not prevented from carrying out the said last-mentioned works by the Eastern Union Railway Company, &c.,—and, further, that the approbation of the lords commissioners of the treasury is given to the said mayor, &c., to borrow on bond or on mortgage of the rates and property of the borough, &c., such sum or sums of money as may enable the said mayor, &c., to pay for the same.” In an action by B. against the corporation upon this agreement, the declaration assigned for breach that the defendants had omitted within a reasonable time to procure and obtain the assent of the commissioners of woods and forests, and the approbation of the lords commissioners of the treasury, as in the agreement mentioned, or to permit the plaintiff to commence the second portion of the said works:—Held, that there was nothing in the language of the agreement to warrant the court in implying a covenant on the part of the corporation to obtain the assent and approbation therein mentioned. *Smith v. The Mayor, &c., of Harwich*, 851

CRIM. CON.

Affidavit of plaintiff's wife.

Upon a motion for a new trial in an action of crim. con., on the ground of surprise.—*Scoble*, that the affidavit of the plaintiff's wife cannot be received for any purpose. *Ling v. Crocker*, 766

And see NEW TRIAL.

DAMAGES.

Measure of.

Tenant holding over.]—Where a tenant holds over after the expiration of a notice to quit, the landlord is entitled to recover against him the damages and costs sustained by

him in an action at the suit of a party to whom he had contracted to let the premises, but to whom the tenant's wrongful act had prevented him from delivering possession. *Bramley, App., Chesterton, Resp.*, 592

DEATH.

See INSURANCE, 2.

DEBTORS' ARRANGEMENT.

See BANKRUPT, 1.

DISCLAIMER.

See LETTERS PATENT, 9.

DRAINAGE.

See METROPOLIS LOCAL MANAGEMENT ACT.

EJECTMENT.

Motion for judgment and execution.

1. A motion for leave to sign judgment and issue execution under the 210th section of the Common Law Procedure Act, 1852, may be made to the court, and is absolute in the first instance. *Yovens v. Keen*, 384
2. *Writ of injunction.*—The Common Law Procedure Act, 1854, does not authorize the issuing of a writ of injunction in an action of ejectment. *Baylis v. Le Gros*, 316

ERROR.

Assignment of:

Frivolous.—The court will not allow execution to issue notwithstanding proceedings in error, under the 150th section of the Common Law Procedure Act, 1852, unless the grounds of error assigned are so frivolous as to be clearly incapable of being sustained on argument. *Hall v. Conder*, 49

ESTOPPEL.

Estoppel in pais.

1. *As between landlord and tenant.*—The rule that a tenant is estopped from denying the title of his landlord is not confined to ejectment, as is suggested in *Watson v. Lane*, 11 Exch. 769. *Delaney v. Fox*, 768
2. An eviction by title paramount puts an end to the estoppel: but, *semble*, that it must be an actual, and not a mere constructive eviction. *Id.*
3. *By conduct and representation.*—The sheriff having a writ commanding him to arrest A., took B., who represented herself to be the person named in the writ:—Held, that, though B. might be estopped by her mis-

representation from suing the sheriff for the original taking, he could not justify detaining her after he had notice that she was not the real party. *Dunston v. Paterson*, 495

EVICTION.

See ESTOPPEL, 2.

EVIDENCE.

Parol evidence to explain written contract.

Upon a contract for the sale of bales of gambier, expected to arrive by a particular ship,—evidence is admissible to show, that, by the usage of the trade, a "bale" of gambier is understood to mean a package of a particular description. *Garrison v. Perrin*, 651

EXPECTED TO ARRIVE.

See AGREEMENT, 6, 7.

FIRE-ARMS.

Proof of:

The Gun-Barrel Proof Act, 1855,—18 & 19 Vict. c. cxlviii,—does not exempt gun-barrels which have been provisionally proved at Birmingham from the necessity of provisional proof in London, if required to be marked there with the definitive proof-mark of the Gun-Makers' Company. *Goodman v. Spencer*, 93

FOREIGN JUDGMENT.

Action upon.

1. A writ of summons issued out of the Court of Queen's Bench in Ireland, after the passing of the 13 & 14 Vict. c. 18, against an incorporated joint stock company registered in London, and also carrying on business by one R., an agent in Dublin, was, by leave of the court, pursuant to the practice of the court under the 43 G. 2, c. 53, s. 8, and 18 & 14 Vict. c. 18, s. 9,—served by delivering a copy (with a copy of the order) personally to the Dublin agent, R., and by sending similar copies through the general post office directed to the manager, secretary, and actuary at the company's office in London. An appearance was afterwards entered for the company by the plaintiff, and judgment signed:—Held, that the judgment so obtained was capable of being enforced by action in the superior courts of England. *Shesky v. The Professional Life Assurance Company*, 211
2. In such an action, a plea merely alleging the absence of personal service of any writ or process, is bad. *Id.*

FORGERY.

See CHECK, 2.

FRAUD.

Contract obtained by,—see RAILWAY COMPANY, 1.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FREIGHT.

See INSURANCE, 1, 2.

FRIENDLY SOCIETY.

Liability of members of a coal-club for goods ordered by the secretary.

1. By the rules of a coal-club (duly certified), provision was made for the appointment of a chairman, secretary, and treasurer, the latter of whom was to receive all moneys taken by the secretary, and to pay the coal-merchant as soon after every delivery of coals as he should receive an order signed by the secretary and chairman. It was then provided that certain weekly payments should be made by the members to the secretary, who were to be entitled at the end of twelve weeks to receive half a ton of coals for each share held by them. It was further provided that the secretary should, on the requisition of the members present at a meeting, apply for tenders to such coal-merchants as they should direct; that, when a tender was accepted at the following meeting, the secretary should agree with the merchant for the required supply,—the coals to be paid for "on the next Thursday night after each delivery, by an order on the treasurer, signed by the secretary and chairman." The plaintiff having tendered to supply the club with about 100 tons of coals, at 23s. per ton, the secretary prepared an agreement for "100 tons, more or less," at that price, which was signed by himself and the plaintiff, but, through the default of the secretary, there were not sufficient funds in the treasurers' hands to pay for them:—

Held, that the secretary was the mere servant of the general body, and must be taken to have acted in that capacity in giving the order for the coals; that, as the club never parted with their control over the money in the hands of the treasurer, or authorized the secretary to expend it, but gave him authority to order the coals for them, and did not furnish him with funds to pay for them, but authorized a contract on credit, the contract so made must be taken to have been made on their credit, and consequently the defendant, as a member of the club, was liable. *Cockrell v. Ascombe*, 440

Construction of s. 41 of the 18 & 19 Vict. c. 63.

2. *Powers and duties of trustees.*—The trustees

of a benefit burial society, who by the constitution of the society are not and cannot be members thereof, are not "persons interested" within the meaning of the 41st section of the Friendly Societies Act, 18 & 19 Vict. c. 63, so as to enable them of their own accord to institute proceedings against the society in the county court, for the purpose of controlling the society in the proposed alteration of their rules. *Hall v. McFarland*, 796

3. The county court having entertained such an application, this court issued a prohibition. *Id.*

GUN-BARRELS.

Proof of,—see FIRE-ARMS.

HABEAS CORPUS.

Where grantable.

The courts have no power to issue writs of habeas corpus to bring up prisoners for the purpose of moving for or shewing cause against rules,—there being no writ known to the law which is applicable to such a purpose. *Benn v. Mosley*, 116

HORSE.

See PARTNERSHIP.

HUSBAND AND WIFE.

Conveyance of the wife's property under 3 & 4 W. 4, c. 74, s. 91.

1. *Form of the affidavit.*—Upon a motion for an order to enable a married woman to execute a conveyance without her husband's concurrence, under the 3 & 4 W. 4, c. 74, s. 91, the court declined to receive an affidavit in which she was described as "wife or widow of W. A." *Anderson, In re*, 118
2. *Husband a minor.*—The husband being a minor, the court granted a rule under the 3 & 4 W. 4, c. 74, to enable the wife to execute a conveyance of her separate property without his concurrence. *In re Huigh*, 196

Agency of the wife.

3. *Necessaries for children.*—A. went abroad in 1852, leaving his wife and three children here, with (what the jury found to be) a sufficient provision for their proper maintenance in his absence: on his return, in 1854, he found that his wife had formed an adulterous connexion with another man, who lived with her, and passed by her husband's name, and he immediately removed his children:—Held, that, under these circumstances, A. was not liable for medicine and attendance furnished for his children at the wife's request, although the plaintiff was not aware of the state in which she was living at the time. *Atkes v. Pearce*, 795

INJUNCTION.

Writ of, under the Common Law Procedure Act, 1854.

Effectment.—The Common Law Procedure Act, 1854, does not authorise the issuing of a writ of injunction in an action of effectment. *Baylis v. Le Gros*, 316

Under 17 & 18 Vict. c. 31, s. 2.—see RAILWAY COMPANY, 4, 5.

INQUIRY.

See WRIT OF INQUIRY.

INSOLVENT DEBTOR.

Discharge.

Liability to surety.—A discharge of the principal under the insolvent debtors act, 1 & 2 Vict. c. 110, does not exonerate him from the claim of a surety on a bond, in respect of payments subsequently made under it by the latter.—*Emery v. Clark*, 382

INSURANCE.

Time policy on freight.

1. *Total loss.*—Freight may be insured by a time policy, though for a period short of the time necessary to complete the voyage on which such freight is to be earned: and there is a *total loss of freight*, if the cargo be so damaged by a peril of the sea, in the course of the voyage, as to render it impossible (except at an expense which would greatly exceed its value on arrival) to carry it to its port of destination. *Michael v. Gillopy*, 527
2. *Continuing policy.*—Freight was insured by a "club policy" from the 24th of January, 1852, to the 1st of March, 1853, subject to the rules of the association,—one of which was as follows: "That the committee, unless they receive ten days' notice to the contrary, shall renew each policy on its expiration, except in cases where it may be deemed expedient not to renew the same, when the committee shall cause similar notice to be given to the parties." No notice having been given:—Held, that this was a continuing policy, and not merely a policy to ensure till the 1st of March. 35.

Against death or injury from accident.

3. *Payment of premium: days of grace.*—A., on the 22d of January, 1851, effected with the defendants an insurance against death or injury from accident, the premium on which was payable on the 22d of January in each year. By one of the conditions endorsed on the policy (the 1st), it was provided that the

premium was to be paid "within twenty-one days from the day on which the same should first accrue or become due," and that, "provided the same should be from time to time paid within such space of twenty-one days, the policy should not be void, notwithstanding the happening before the expiration of such space of twenty-one days of the event or events upon the happening whereof the amount secured by the policy should, according to the terms thereof, become payable." By another condition (the 2d), it was provided, that, "if the premium should be unpaid for twenty-one days next after it should become due, the policy should be absolutely void, and the assured should forfeit all claim thereunder. And it was further provided (by the 4th condition), that, "in every case when a new premium should become payable, the directors should be at liberty to terminate the risk, by refusing to accept such premium," &c.

A. duly paid the premiums under this policy down to the year 1855. On the 27th of January, 1856, an accident happened to him, which caused his death on the 1st of February following. On the 4th of February, the company had notice of the death, and a correspondence took place between their secretary and the attorney for A.'s executors respecting the cause of the death and their claim on the policy, neither party at first knowing that the premium which became due on the 22d of January, 1856, was unpaid. On the 8th of February, the secretary for the first time became acquainted with the fact of the non-payment of the premium, but did not communicate it to the executors or their attorney until the 13th (the day after the expiration of the twenty-one days allowed by the 1st condition for payment of the premium), when he informed the latter by letter that the directors had considered and rejected the claim:—

Held,—first, that there was nothing in the conditions to enable the executors of A. to pay the premium after his death, and that, if they had tendered it within the twenty-one days, the company would not have been bound to accept it:

Secondly, that the policy was, by reason of the non-payment of the premium within the terms of the policy and conditions, absolutely void; and that the company were not estopped from denying the payment:

Thirdly, that neither the plaintiffs nor the assured (had he been living) would have had an absolute right to keep the policy alive by payment or tender of the premium within the twenty-one days,—the 4th condition giving the directors the option of refusing to continue it or not at their pleasure. *Stimpson v. The Accidental Death Insurance Company*, 257

INTEREST.

Where recoverable.

The plaintiff discounted for the defendant a bill for 250*l.*, drawn by the latter upon one A., the defendant and A. at the same time signing the following memorandum, addressed to the plaintiff:—"Sir,—In consideration of your discounting the under-mentioned bill, we do hereby jointly and severally undertake, if the same is not wholly paid at maturity, to pay, as interest thereon, 20*l.* for each month, any portion of which shall have elapsed after maturity of the said bill, and until the same is wholly paid and satisfied." At the foot of this memorandum was written, "250*l.* Jennings on A., at three months." The bill not having been paid at maturity, the plaintiff sued the defendant thereon, claiming by the particulars endorsed on the writ interest at the rate of 20*l.* per month, as per agreement, but declaring only on the bill, and obtained a verdict and judgment thereon. The plaintiff afterwards brought another action against the defendant upon the agreement for the stipulated interest of 20*l.* per month:—Held, that the former judgment was no answer to the plaintiff's claim for interest accruing before the recovery of such judgment, but that the plaintiff was not entitled to recover in the second action interest accruing since. *Florence v. Jennings*, 454

INTERLOCUTORY ORDER.

Remedy on.

An action will not lie upon an interlocutory and collateral order for costs: the mode of enforcing them is by attachment in the court by which the order is made. *Sheehy v. The Professional Life Assurance Company*, 211

INTERROGATORIES.

Under 17 & 18 Vict. c. 125, s. 51.

The court will not allow interrogatories (under the 17 & 18 Vict. c. 125, s. 51) the tendency of which is to discover how the plaintiff intends to shape his case, without furthering any case which the defendant has to set up. Neither will interrogatories be allowed for the purpose of contradicting a written document. *Moor v. Roberts*, 671

IRISH JUDGMENT.

See FOREIGN JUDGMENT.

JOINT-STOCK BANK.

Sale and transfer of shares.

2. The plaintiff, stock-brokers, and members of the London Stock Exchange, on the 26th of August, 1856, at the request of the defendant, bought for him twenty shares in a joint

stock bank called The Royal British Bank, to be paid for on the "settlement day," which was on the 15th of September, and duly forwarded to him the usual broker's contract-note. The bank stopped payment on the 24 of September, and ultimately became bankrupt. On the 11th, the defendant repudiated the transaction, and gave the plaintiff notice not to pay the price on his account. The plaintiff having been compelled according to the rules of the Stock Exchange to pay for the shares on the settlement day, sent the defendant the certificates and transfers, and, upon his declining to accept them, sued him for money paid:—Held, that they were entitled to recover. *Taylor v. Stray*, 175

2. Affirmed on error. 197

Execution against shareholders.

3. Upon a rule for execution against a shareholder of a joint stock bank, under the 7 & 8 Vict. c. 113, the question raised presenting some difficulty, the court declined to decide it upon motion, but directed a special case to be stated. *Powis v. Harding*, 465
4. Upon a rule for execution against a shareholder of a joint stock bank, under the 7 & 8 Vict. c. 113, the question raised presenting some difficulty, the court declined to decide it in a summary way, but directed that a *sci. fa.* should issue and a special case be stated. *Fry v. Harding*, 467

JOINT STOCK COMPANY.

Scire facies against shareholders.

1. *[Affidavit on motion for.]*—An application, under the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16; a 36, for leave to issue a *sci. fa.* against a shareholder on a judgment against the company, was founded upon an affidavit which stated that two writs of *fi. fa.* had been issued against the company, and returned nullis bona; that deponent believed, from inquiries which he had made of the secretary and a shareholder, that the company had not at the time of the recovery of the judgment, or since, any property, goods, or chattels, and that any execution against them would be ineffectual; that all due diligence and means had been used to obtain satisfaction; and that the deponent, as clerk to the company's solicitor, had transacted much of their legal business, and thereby became well acquainted with their position and circumstances:—Held, sufficient. *Wyatt v. The Darent Valley Railway Company*, 110
2. It is no answer to a motion for a *scire facies* against a shareholder of a joint-stock company, under the 8 & 9 Vict. c. 16, a 36, upon a judgment obtained against the company, that the company is indebted to the shareholder against whom execution is sought, to

a greater amount than that of his unpaid calls, for moneys disbursed by him as a director on behalf of the company. *Wyatt v. The Darwent Valley Railway Company*, 110
And see RAILWAY COMPANY, 6.

JUDGES' NOTES.

Practice as to bespeaking, — see Cockrell v. Ancombe, 445, n.

JUDGES' ORDER.

Filing, under 12 & 13 Vict. c. 106, s. 137.

The 137th section of the 12 & 13 Vict. c. 106, enacts that every judge's order made by consent given by a trader defendant, authorizing the plaintiff to sign judgment and issue execution, shall be filed with the clerk of the dockets and judgments in the Court of Queen's Bench within twenty-one days, otherwise the order, and any judgment or execution thereon, shall be null and void to all intents and purposes whatever.

A., a trader, gave B. a judge's order for payment of a certain debt and costs to be taxed: the costs were duly taxed, and the amount of debt and costs paid; and afterwards, and within twenty-one days from the date of the order, B. caused it to be filed:—Held, that he had a right to do so. *Dimmark v. Bouley*, 542

Held, also, that, whether the statute made the filing of the order under the circumstances imperative or not, no action would lie against B. for filing it, inasmuch as it could not be said to have been done without reasonable or probable cause. *Id.*

If the filing had been an authorized act, — *semble* (per Williams, J.), that the declaration would be sufficient without an allegation of want of reasonable or probable cause. *Id.*

JUDGMENT.

Entering satisfaction, — see REGULE GENERALE, 2.

LANDLORD AND TENANT.

Tenant estopped from denying title of landlord.

1. The rule that a tenant is estopped from denying the title of his landlord is not confined to ejectment, as is suggested in *Watson v. Lane*, 11 Exch. 769. *Delaney v. Fox*, 768
2. An eviction by title paramount puts an end to the estoppel: but, *semble*, that it must be an actual, and not a mere constructive, eviction. *Id.*
3. Where a tenant holds over after the expiration of a notice to quit, the landlord is entitled to recover against him the reasonable damages and costs sustained by him in an action at the suit of a party to whom he had contracted to let the premises, but to whom the tenant's wrongful act had prevented him from de-

livering possession. *Bramley, App., Chester-ton, Resp.*, 592

LETTERS PATENT.

Agreement for transfer of.

1. By an agreement,—reciting that the plaintiff “had invented a method for the prevention of boiler explosions, and had obtained a patent for the use of the same within the united kingdom, and was desirous of taking out patents in France, Belgium, and such other places as might be found expedient,” and further reciting that he had disposed of a moiety of the English patent, and had applied to the defendants to purchase the other moiety, and to assist him in taking out the foreign patents,—it was agreed that the defendants should pay to the plaintiff 2500*l.* in such manner as should be mutually agreed on, and also a proportion of the net profits: and, in consideration of such engagement on the part of the defendants, the plaintiff “agreed to make over and transfer, and did thereby accordingly make over and transfer to the defendants one half of the said foreign patents when the same should be obtained, and the above-mentioned one half of the English patent thereinbefore referred to.”

A declaration on the above agreement, averring that the plaintiff was ready and willing to do and did all things necessary on his part to entitle him to the performance of the agreement, and to the payment of the 2500*l.* by the defendants, alleged for breaches. —first, that, although a reasonable time had elapsed, the defendants refused to pay the 2500*l.* or any part thereof,—secondly, that, although a reasonable time had elapsed, the defendants refused to enter into or make any agreement or arrangement with the plaintiff respecting the manner in which the 2500*l.* should be paid,—thirdly, that, although a reasonable time had elapsed, the defendants refused to fix upon or agree with the plaintiff respecting the time or times at which the 2500*l.* or any part thereof should be paid.

The defendants pleaded, to the first breach, that, at the commencement of the action, no agreement had been come to as to the manner in which the 2500*l.* should be paid. They also demurred to the second and third breaches. And, as to all the breaches, they further pleaded,—secondly, that the invention was wholly worthless and of no public utility, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof,—thirdly, that, after the making of the agreement, and before the time for performing it had arrived, and before breach, and before the commencement of the suit, it was agreed that the defendants should pay and the plaintiff receive 200*l.* as the balance then to be paid of the

2500*l.* stipulated for, and that the said sum of 200*l.* should be in full satisfaction of all claims of the plaintiff in respect of the agreement until some profit should have been realised by the defendants from the invention and the letters patent; that, in pursuance of such agreement, the 200*l.* were paid and received by the plaintiff in such full satisfaction as aforesaid; and that no profit had been realised from the invention.

The plaintiff demurred to each of these pleas:—

Held, that the second breach was well assigned; for that the time for payment of the money had arrived; and, if the agreement as to the mode of payment was a condition, the defendants, by refusing to enter into any agreement, had rendered the performance of it impossible, and had either placed the plaintiff in the same position as if there had been no condition, or had become liable to a claim of the same amount, as damages for wrongfully refusing to agree. *Hull v. Conder*, 22

2. Held also, that the second plea was bad; for, that, in the absence of any allegation of fraud, it must be assumed that the plaintiff was an inventor, and there was no warranty, express or implied, either that he was the true and first inventor within the meaning of the statute of James, or that the invention was useful or new; but that the contract was for the sale of the patent such as it was, each party having equal means of ascertaining its value, and each acting on his own judgment. *Id.*

3. Held also, that the third plea was bad, being pleaded to all the breaches, and being no traverse of the first. *Id.*

4. Whether the first plea afforded any answer to the first breach,—*quare?* for, *semble*, that, if no mode of payment of the 2500*l.* was agreed on, the money would be payable as the law directs where there is no stipulation for agreement. *Id.*

5. Judgment affirmed in Exchequer Chamber. 53

Construction of specification.

6. A patentee describing his invention in the specification, is to be taken to claim as part of his invention all that he describes as the means by which it is to be carried into effect, unless he clearly expresses a contrary intention. *Tetley v. Easton*, 706
7. The plaintiff obtained a patent for "certain improvements in machinery for raising and impelling water and other liquids;" and by his specification he described a machine for raising and impelling water by centrifugal force, the material parts of which were as follows:—"g g is an iron case made air-tight. In the interior of the case g g is placed a hollow wheel, having hollow spokes or radial

arms, of which e e are two: r r I call the nave, which is hollow: and s s are two hollow shafts, one at each side of the wheel. In the interior of the nave r there is a boss or plate of metal, marked u, which is cast in at the time the wheel is cast, and which carries the wheel. The shaft i i passes through the centre of this plate, and is firmly keyed in."

"In reference to the hollow wheel, I do not confine myself to the number or to the use of hollow spokes, but, in some cases, purpose to substitute circular discs, with a narrow water channel between them, and a valve or flexible valve or valves on the circumference, so as to have a channel or channels in the interior thereof for the passage of liquids, and adapted to neutralize the effects of suction, by having a corresponding or proportionate degree of suction at each side." "I shall now proceed to explain more particularly what I claim as my invention or inventions. I do not claim to be the discoverer that liquids may be raised by centrifugal force, nor do I claim in any way the sole application of machinery for raising water or other liquids by centrifugal force." He then introduced nine several distinct claims, the whole of which were subsequently by two memorandums of disclaimer struck out, except the following:—"I claim as my invention and application the means of increasing the action of the machine by causing the liquid to enter the wheel at both sides." And by one of the memorandums of disclaimer, the plaintiff stated,—"I disclaim any exclusive right to wheels, whether consisting of hollow spokes or of a channel or channels between discs, when considered apart or separately from the machinery described: and I also disclaim any exclusive right to the parts of the machinery when they are each considered apart or separate from the machinery described."

Upon the trial of an action for an infringement of the patent, in which issues were taken on the plaintiff's being the first inventor and on the novelty of the invention, it appeared that one B. had previously patented an invention of "a new mode of increasing the power of certain media when acted upon by rotary fans or other similar apparatus," the specification of which described a series of fans revolving in cases into which the air or water to be acted upon was admitted equally on both sides. The fans and cases so described in B.'s specification were almost identical with the wheel used by the plaintiff, except that they had not a central disc, and were attached to the axle by spokes extending from the axle to the outer edge of the openings for the admission of the air or water:—

Held, that, as neither the form of the wheel used by the plaintiff, nor the plan of admitting water at both sides for the purpose of being projected forward by centrifugal force was

new, the plaintiff could not claim to be the inventor of "the means of increasing the action of the machine by causing the liquid to enter the wheel at both sides;" and, consequently, that he failed upon the issues of invention and novelty. *Tetley v. Easton*, 706

8. The discovery that a particular advantage may be attained by the use of a machine known before, in a manner known before, is not an invention or application which can be made the subject of a patent. *Id.*

Effect of disclaimer.

9. Per *Cresswell, J.*, the effect of a disclaimer is, merely to strike out from the specification those parts of the machinery which are disclaimed: it cannot be read as explanatory of that which remains. *Tetley v. Easton*, 706

Pleadings.

10. *Adding plea.*—Leave to add a plea to the second and third breaches (traversing the requests and breaches therein respectively alleged) refused. *Hall v. Conder*, 43

11. *What put in issue by non concessit.*—In an action for the breach of an agreement to make the necessary periodical payments for stamp-duty to keep alive a patent which had been assigned to the defendant:—Held, that "non concessit," in the absence of any fraud, or of any warranty that the alleged invention was new or was a manufacture within the statute of James, puts in issue merely the fact of Her Majesty having granted the patent, and not its validity. *Smith v. Neale*, 67

LIEN.

For freight,—see SHIPPING, 2.

MALICIOUS ARREST.

Special damage.

In an action for maliciously and without reasonable or probable cause causing the plaintiff to be arrested under a ca. sa. issued upon a judgment obtained by the defendant against him, and upon which the defendant maliciously and without reasonable or probable cause endorsed a direction to levy the whole amount recovered by the judgment, whereas a portion of that amount had been previously satisfied,—the declaration alleged, as damage caused by the arrest for the greater amount, that the plaintiff was, after he was taken, during his detention, and before his discharge, able and willing and offered to pay, and always afterwards during his detention was willing to pay, and was finally discharged from imprisonment upon paying the smaller sum; and that the plaintiff, by reason of the premises, was necessarily put to and incurred divers costs and expenses in and about obtaining his discharge:—Held, that the declaration sufficiently showed special damage

resulting to the plaintiff from the arrest,—inasmuch as, to entitle him to a verdict, the plaintiff must show, not merely that he was arrested and kept in custody for a greater amount than was due, however improperly endorsed, but also that, by reason of the arrest and detention for the larger sum, his imprisonment was prolonged, or the expense of obtaining his discharge increased. *Jennings v. Florence*, 467

MALICIOUS PROCEEDING.

Under 12 & 13 Vict. c. 106,—see BANKRUPT, 7.

MARKET VALUE.

See AGREEMENT, 4.

MASTER AND SERVANT.

Liability of master for negligence of servant.

1. A master is responsible for an injury occasioned by the negligent driving of his servant, where he is acting at the time in his service and in a manner impliedly sanctioned by him. *Patten v. Rea*, 666
2. A., the general manager of the defendant, the proprietor of a horse repository, was possessed of a horse and gig, which were kept for him upon the defendant's premises free of charge, and were used by A. in the conduct of the defendant's business. In going (with the knowledge of the defendant) upon the defendant's business, with the horse and gig, A. drove against and killed the plaintiff's horse:—Held, that the defendant was responsible; and that it was immaterial that A. was also going on private business of his own. *Id.*

3. The defendant engaged the services of one S., a thatcher, for a certain period, at weekly wages, for the purpose of hiring him out to do thatching work for his profit. S. having during the period thatched some stacks of wheat, &c., for the plaintiff, for which work the defendant claimed and received payment:—Held, that the defendant was responsible to the plaintiff for injury to the wheat, &c., occasioned by the negligent manner in which S. did the work. *Holmes v. Onion*, 790

MEASURE OF DAMAGES.

See DAMAGES.

MERCANTILE CONTRACT.

Construction of,—see AGREEMENT, 5—8.

MERCHANT SHIPPING ACT, 1854.

See SHIPPING, 5—8.

METROPOLIS MANAGEMENT ACT.

Construction of.

1. Where a pecuniary obligation is created by a statute, and a remedy expressly given for enforcing it, that remedy must be adopted. *The Vestry of St. Pancras v. Batterbury*, 477
2. An action in a superior court will not lie against the owner or occupier of a house, for the recovery of his proportion of the expenses of paving a street, under the Metropolis Local Management Act, 18 & 19 Vict. c. 120; but recourse must be had to the remedy pointed out by the 225th section of the act, viz. by a proceeding before two justices. *Id.*

3. A. held premises under a building lease, with a covenant to pay, bear, and discharge "all such parliamentary, parochial, and county, district, and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burthens, duties, and services whatsoever as during the term should be taxed, assessed, or imposed upon or in respect of the premises, or any part thereof." He granted an underlease (at a rack-rent) to B., the latter covenanting "that the several covenants, conditions, and agreements contained in the original lease on the lessee's part to be performed and observed (except the covenants to pay rent and to insure), should during the continuance of the demise be performed and observed by him:"—

Held, that B. was liable for the expense of drainage works done upon the premises under the authority of the Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120. *Sweet, App., Seager, Resp.*, 119

MILITARY LAW.

See SHIPPING, 3, 4.

MISDIRECTION.

See SHIPPING, 3—6.

MISJOINDER.

See AMENDMENT, 3, 4.

MONEY PAID.

See JOINT STOCK BANK, 1.

NECESSARIES.

See HUSBAND AND WIFE, 2.

NEGLIGENCE.

In driving a carriage,—*see MASTER AND SERVANT*, 1, 2.

In navigating a ship,—*see SHIPPING*, 3—6.

In performance of work,—*see MASTER AND SERVANT*, 2.

NEW TRIAL.

Surprise.

Upon a motion for a new trial in an action of crim. con., on the ground of surprise,—*Semble*, that the affidavit of the plaintiff's wife cannot be received for any purpose. *Ling v. Croker*, 700

Misdirection,—*see SHIPPING*, 3—6.

NOVELTY.

See LETTERS PATENT, 6—8.

PARENT AND CHILD.

See HUSBAND AND WIFE, 2.

PARTNERSHIP.

What constitutes a partnership.

A. and B. being joint owners of a race horse, it was agreed between them that A. should keep and train and have the general management of the horse, conveying him to and entering him for the different races; that 35s. per week should be allowed for his keep; and that the expenses of keep, &c., should be borne jointly by A. and B., and the horse's winnings be equally divided between them. A. having paid all the expenses of the keep and management of the horse, and there being no winnings to divide:—Held, that,—even assuming that this agreement constituted a partnership between A. and B. (which the court, dissentients Cockburn, C. J., thought it did not),—A. was entitled to recover from B. a moiety of the disbursements made by him on account of the horse, as being in the nature of an advance of capital for B. *French v. Styling*, 357

PAVING.

See METROPOLIS MANAGEMENT ACT, 1, 2.

PERVERSE VERDICT.

See WRIT OF INQUIRY.

PLEADING.

See assault domestic,—*see ASSAULT*.

Adding pleas,—*see LETTERS PATENT*, 11.

POLICY.

Construction of,—*see INSURANCE*, 2.

PRISONER.

See HABEAS CORPUS.

PRIVILEGE.

From arrest,—*see ATTORNEY*, 1.

PROCESS.

Service of.

2. *Substituted service in Ireland.*—A writ of summons issued out of the Court of Queen's Bench in Ireland, after the passing of the 13 & 14 Vict. c. 18, against an incorporated joint stock company duly registered in London, and also carrying on business by one R., an agent in Dublin, was, by leave of the court, pursuant to the practice of the court under the 43 G. 3, c. 53, s. 8, and 13 & 14 Vict. c. 18, s. 9,—served by delivering a copy (with a copy of the order) personally to the Dublin agent, R., and by sending similar copies through the general post office directed to the manager, secretary, and attorney at the company's office in London. An appearance was afterwards entered for the company by the plaintiff, and judgment signed:—Held, that the judgment so obtained was capable of being enforced by action in the superior courts of England. *Sheehy v. The Professional Life Assurance Company*, 211
2. In such an action, a plea merely alleging the absence of personal service of any writ or process, is bad. *Ib.*
3. Whether the 9th section of the 13 & 14 Vict. c. 18, per se gave the Irish court power to order substituted service in such a case,—*quare?* But, at all events, there is nothing in that act to take away the jurisdiction which they previously had under the 43 G. 3, c. 53. *Ib.*

PROHIBITION.

See COUNTY COURT, 1.

PUBLIC COMPANY.

See JOINT STOCK BANK. JOINT STOCK COMPANY. RAILWAY COMPANY.

RACE-HORSE.

See PARTNERSHIP.

RAILWAY COMPANY.

Liability, of, as common carriers.

1. *Special contract obtained by fraud.*—A declaration against a railway company, for damage to goods intrusted to them to carry, alleged that the goods were delivered to the defendants as common carriers, and that they received them as such common carriers. Plea that the goods were received by the defendants to be carried subject to a special contract whereby they were declared not to be answerable for any loss or damage, however caused. In support of the plea, the defendants produced a paper, signed by the plaintiff, acknowledging that the goods were to be carried subject to certain conditions, one of which was, that the company were not to be responsible for any loss or damage, however caused, &c. On the part of the plaintiff, it

was proved, that, when asked by a clerk of the defendants at the time the goods were delivered at the company's warehouse to sign the paper, the plaintiff expressed his unwillingness to do so, inasmuch as he could not see to read it, whereupon the clerk said that it was of no consequence, and that the signature was a mere matter of form; and that the plaintiff, relying upon that assurance, signed the paper:—Held, that, upon this evidence, the jury were warranted in finding that the goods were not delivered to the company to be carried under the special contract. *Simons v. The Great Western Railway Company*, 620

Special contract for conveyance of goods.

2. In an action against a railway company for negligence in forwarding goods, whereby they lost a market, the declaration alleged that the defendants were common carriers, and received the goods in question to be carried by them as such common carriers for hire and reward. Plea, traversing the averment that the defendants received the goods as common carriers. It appeared in evidence that the defendants did not receive any goods to be carried by them, unless the consignor signed a paper containing various conditions, subject to which they were to be carried. The judge, holding that the conditions were reasonable, and the contract a special contract within the 17 & 18 Vict. c. 31, s. 7, and that consequently the defendants did not receive the goods to be carried by them as common carriers, directed a nonsuit:—Held, that the nonsuit was right. *White v. The Great Western Railway Company*, 7

Contract for demurrage.

3. The defendants hired sacks from the plaintiff for the conveyance of grain on their railway, subject to certain regulations, amongst which were the following:—"2. The charges for the use of sacks will be $\frac{1}{4}$ d. per sack per journey when discharged at any of the company's stations on the company's line, or at their warehouses, or at warehouses or mills connected by rail with the company's lines; and 1d. per sack when sent to foreign stations: 3. Demurrage of $\frac{1}{4}$ d. per sack per week will be charged after the expiration of fourteen days; the hire to commence from the time the sacks leave the station to be filled; the time allowed for filling and returning to the station to be seven days: 10. None of the company's sacks containing grain will be allowed to leave any station (local or foreign), unless a guarantee is first obtained by the clerk in charge, from the consignee, that the grain will be immediately discharged, and the sacks returned the same day, and to the same station."—Held, that the company's claim for demurrage arose at the expiration

of fourteen days from the hire of the sacks; and that the only person with whom there was any contract for demurrage was the consignee, by virtue of the 3d regulation; but that, by the operation of the 10th regulation, his liability ceased upon the company's permitting the sacks to get into the hands of the consignee, whether with or without a guarantee. *The Great Northern Railway Company v. Wyle,* 344

Injunction under the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31.

4. A railway company agreed with a cab proprietor, in consideration of his paying them 600*l.* per annum, to allow him the exclusive liberty of plying for hire within their station:—The court refused to grant a writ of injunction against the company, under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), at the instance of another cab proprietor,—no inconvenience to the public being shown to have arisen from the arrangement. *Beadell, In re,* 509

5. A railway company granted exclusive permission to a limited number of fly-proprietors to ply for hire within their station:—The court refused to grant a writ of injunction against the company, under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), at the instance of a fly-proprietor who was excluded from participation in this advantage,—although it was sworn by the complainant and by several other fly-proprietors who were likewise excluded, that occasional delay and inconvenience resulted to the public from the course pursued. *Painter, In re,* 702

Scire facies against shareholders.

6. The court refused to suspend or enlarge a rule for a *sci. fa.* against a shareholder in a railway company, upon a suggestion that the claim in respect of which the judgment against the company was obtained was founded upon an attorney's bill contracted by them in the prosecution of matters altogether *ultra vires*. *Edwards v. The Kilbenny and Great Southern and Western Railway Company,* 397

REGULE GENERALES.

*Endorsement of notice on writs on Contract under 20*l.**

1. It is ordered that plaintiffs suing in contract for 20*l.*, or less, may, if they claim costs, endorse on the writ of summons the following notice:—

“Take notice, that, if judgment be signed for default of appearance, the plaintiff will without summons apply to a judge for his costs of suit, unless before such judgment you shall give notice to him or his attorney that you intend to oppose such application.”

And it is further ordered, that, if the de-

fendant give such notice, the plaintiff shall proceed by summons and order.

But, if the defendant give no notice, the plaintiff may produce such endorsement to a judge at Chambers, for an order for costs, *ex parte*; and, if the judge shall sign his name to the endorsement, such signature shall be an order for costs, and the master may tax them thereon accordingly. In case of any application for costs without such endorsement, the plaintiff shall not be entitled to more costs than if he had made such endorsement, unless a judge shall otherwise order. *R. T.* 1857, 91

Entry of satisfaction on judgment.

3. Upon a satisfaction-piece duly signed and attested in accordance with the 56th rule of Hilary Term, 1853, being presented to the clerk of the judgments of the masters in the court in which the judgment has been signed, he shall file the same, and enter satisfaction in the judgment-book against the entry of the said judgment; and no roll shall be required to be carried in for the purpose of entering satisfaction on a judgment. *R. T.* 1857, 92

SALE.

Of goods.

Sale by sample.—Where goods are sold by sample, the handing over the samples to the buyer does not, in the absence of evidence of an usage or custom to the contrary, amount to a delivery and acceptance of a part of the thing sold, so as to take the case out of the 17th section of the Statute of Frauds: but it is otherwise where the buyer draws samples from the bulk after he has purchased the goods. *Gardner v. Groat,* 346

And see AGREEMENT, 3—7.

SAMPLES.

See SALE.

SCIRE FACIAS.

See JOINT STOCK BANK, 3, 4. RAILWAY COMPANY, 6.

SEAMEN'S WAGES.

See SHIPPING, 7.

SERVICE.

See PROCESS.

SHARES.

See JOINT STOCK BANK, 1.

SHERIFF.

Arrest of wrong party.

The sheriff having a writ commanding him to

arrest A., took B., who represented herself to be the person named in the writ:—Held, that, though B. might be estopped by her misrepresentation from suing the sheriff for the original taking, he could not justify detaining her after he had notice that she was not the party. *Dunston v. Paterson*, 495

SHIPPING.

Bill of lading.

1. A stipulation in a bill of lading, that the shipowner is "not to be accountable for leakage or breakage," does not exempt him from responsibility for a loss by these means, arising from gross negligence. *Phillips v. Clark*, 156

2. *Lien for freight.*—By a memorandum of charter, made at Liverpool, it was agreed that the ship should load a cargo there, and proceed to China, and there deliver the same agreeably to bills of lading, and afterwards load a full cargo of tea or other lawful merchandise for Liverpool or London, and deliver the same to the charterers or their assigns, they paying freight for the same at the rate of 7l. 10s. per ton of 50 cubic feet for tea delivered, for the round out and home; other goods, if shipped, to pay in customary proportion: in consideration whereof, the outward cargo to be carried freight-free: payment to become due and to be made as follows,—800*l.* on sailing, by charterers' acceptance at three months' date, and the balance on the unloading and delivery of the cargo, by approved bills on London at two months' date, or cash: "the master to sign bills of lading at such rates of freight as may be required by the agents of the charterers, without prejudice to this charter-party; and the owners to have an absolute lien upon the cargo for the recovery of all freight, dead-freight, demurrage, &c., due the ship under this charter-party."

By another memorandum, endorsed on the above, Singapore was substituted for China: and it was agreed, that, on delivery of the cargo in Singapore, the freighters' agents there should have the option of loading the ship for London or Liverpool, or for China; that, in the event of the vessel returning from Singapore, the freight for the round should be 237*5*s.** in full; that, should the vessel proceed to China, the freighters should pay an additional of 30*s.* per ton on the homeward cargo from thence, for the privilege of carrying intermediate freight from Singapore to China; and an acceptance at three months for 900*l.*, on the ship's sailing from Liverpool, was substituted for 800*l.*

The ship was laden by the charterers chiefly as a general ship; but they shipped on their own account goods for which the master signed bills of lading making the goods de-

liverable at Singapore to M. & Co., or assigns, paying freight as per margin: in the margin, the freight (in the aggregate, 196*l.* 12*s.*) was declared to be "payable in Liverpool one month after sailing of vessel, lost or not lost."

The vessel sailed from Liverpool on the 21st of February, 1856, and the charterers gave their acceptance at three months for 900*l.*, which became due on the 23d of May, and was dishonoured:—

Held, that the owners had a lien upon the goods so shipped by the charterers, for the amount of the bill of lading freight, as against the consignees (M. & Co.), who had advanced money to the consignors upon the shipment; but not for the 900*l.* *Gilksion v. Middleton*, 194

*And see WAR.**Liability of owner, &c., in case of collision.*

3. *Semble*, that the owner of a transport hired by government for the purpose of assisting in a warlike expedition, is not responsible for damage done to another transport forming part of the same expedition, where such damage results from the master's obedience to orders of the officer under whose immediate command he sails. *Hodgkinson v. Fernie*, 418

4. A. and B. were respectively owners of vessels which with many others were taken up by government for the conveyance of troops upon an expedition of war in the Black Sea:—the transports were towed by steamers to their destination, each steamer having attached to her two transports, the masters of which were under her immediate order and control: the commander of the steamer to which B.'s vessel and another were attached, on reaching the anchoring ground in the evening, having dropped his anchor, desired the masters of his tows to hold on by their warps or hawsers; but, in the course of the night, a storm arose which caused B.'s vessel to swing with violence against A.'s vessel, whereby it was considerably damaged. In an action for the damage so caused, the learned judge who tried the cause told the jury that B. would not be responsible if the injury complained of resulted from a strict obedience on the part of the master to the orders of the officer in command of the steamer; but that, assuming that the master was justified by the orders he received in abstaining from anchoring in the first instance, it was for them to consider whether he had not been guilty of negligence and want of good seamanship in continuing to hold on by his warp under the altered state of circumstances,—there being some evidence to show that the accident might have been averted if he had dropped his anchor when the storm came on:—Held, no misdirection.

Jb.

B. Construction of the Merchant Shipping Act, 1854.—In an action for an injury to the plaintiff's vessel in consequence of a collision with a vessel under the control of the defendant,—there being conflicting evidence of negligence on the one side and on the other,—the jury were told, that, if the negligence or default of the plaintiff was in any degree the *direct* or *proximate* cause of the damage, he was not entitled to recover, however great might have been the negligence of the defendant; but that, if the negligence of the plaintiff was only *remotely* connected with the accident, then the question was whether the defendant might by the exercise of ordinary care have avoided it:—Held, a proper direction. *Tuff v. Warman*, 740

C. The Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, leaves the rule of law upon this subject as it was before; the only effect of the 296th and 298th sections being, to bring the non-compliance with the Admiralty sailing regulations within the category of negligence. *Id.*

Ship's articles.

7. The plaintiff, a seaman, in March, 1854, shipped on board a vessel of the defendants, called the *Custos*, to serve as steward, and signed articles, as required by the statute 13 & 14 Vict. c. 93,—which professed to be an agreement between the master and the several persons whose names were thereto subscribed,—at 3*l.* per month wages, for a voyage “from Liverpool to the west coast of Africa, to trade in any ports, bays, or rivers therein, and back to a final port of discharge in the united kingdom, or for a term not to exceed three years.” The articles contained, amongst others, the following provision,—“The crew, if required, to be transferred to any other ship in the same employ.” After the *Custos* had remained some time on the African coast, the plaintiff, at the request of the captain, was transferred to another and a larger vessel of the defendants’ engaged in the same trade, called the *Dauntless*, entering into fresh articles with the master, under which he was to receive wages at the rate of 4*l.* per month. The *Dauntless* arrived in Liverpool on her return voyage in June, 1856, when the plaintiff claimed wages at 4*l.* per month for the period during which he had served on board the *Dauntless*. The defendants refused to pay him at the increased rate, insisting that he was bound by the original articles to serve on board any ship “in the same employ;” and the plaintiff declined to accept the sum mentioned in the original articles:—Held,—

First, that the articles were not invalid for being in the alternative,—“from Liverpool to the west coast of Africa and back, or for a term not to exceed three years.”

Secondly, that the provision for the trans-

fer of the crew to another vessel in the same employ, was not a contravention of the statute:

Thirdly, that the provision for transfer was not limited to a transfer of the whole crew collectively, but that the articles constituted an agreement between the owners and each of the crew for himself, and consequently that the plaintiff was bound to serve under the original articles, and there was therefore no consideration for the master's promise to pay the increased wages:

Fourthly, that there was no neglect or refusal by the defendants, without sufficient cause, to pay the plaintiff the wages really due, so as to render them liable to the penalty imposed by the statute. *Fraser v. Hutton*, 512

8. Held also, that the circumstance of the fresh articles not having been executed in the presence of the consular agent, was not an objection to their validity, provided they *could* have been set up. *Id.*

SMALL ARMS.

See FIRE-ARMS.

SPRING-GUN.

Injury from.

The plaintiff entered the defendant's garden at night, and without his permission, to search for a stray fowl, and whilst looking closely into some bushes, he came in contact with a wire, which caused something to explode with a loud noise, knocking him down and slightly injuring his face and eyes:—Held, that the defendant was not liable for this injury at common law, nor, in the absence of evidence that it was caused by a spring-gun or other engine “calculated to inflict grievous bodily harm,” under the statute 7 & 8 G. 4, c. 13, s. 1. *Wootton v. Dunscombe*, 412

STATUTE.

Construction of.

1. Where a pecuniary obligation is created by a statute, and a remedy expressly given for enforcing it, that remedy must be adopted. *The Vestry of St. Pancras v. Batterbury*, 477
2. An action in a superior court will not lie against the owner or occupier of a house, for the recovery of his proportion of the expenses of paving a street, under the Metropolitan Local Management Act, 16 & 19 Vict. c. 126; but recourse must be had to the remedy pointed out by the 225th section of the act, viz. by a proceeding before two justices. *Id.*

STATUTE OF FRAUDS.

What a sufficient agreement within s. 2.

1. A written proposal, containing the terms of a proposed contract, signed by the defendant, and assented to by the plaintiff by word of mouth, is a sufficient agreement within the 4th section of the statute of frauds. *Smith v. Neale*, 67

2. An agreement whereby all that is to be done by the plaintiff constituting one entire consideration for the defendant's promise, is capable of being performed within a year, and no part of what the plaintiff is to do constituting such consideration is intended to be postponed until after the expiration of the year, is not within the 4th section of the statute of frauds, notwithstanding the performance on the part of the defendant is or may be extended beyond that period. *Id.*

Part delivery under s. 17.

3. Where goods are sold by the sample, the handing over the samples to the buyer does not, in the absence of evidence of an usage or custom to the contrary, amount to a delivery and acceptance of a part of the thing sold, so as to take the case out of the 17th section of the statute of frauds: but it is otherwise where the buyer draws samples from the bulk after he has purchased the goods. *Gardner v. Groul*, 340

STAY OF PROCEEDINGS

See BANKRUPT, 4.

STOCK-BROKER.

Contract for shares,—see JOINT STOCK BANK, 1.

STOCK EXCHANGE.

Rules of,—see JOINT STOCK BANK, 1.

SUBSTITUTED SERVICE.

See PROCESS.

SUM RECOVERED.

See ARREST, 1, 2.

SURETY.

See INSOLVENT DEBTOR.

SURPRISE.

See NEW TRIAL.

TRAFFIC ACT.

See RAILWAY COMPANY, 4, 5.

TREASURY.

Approbation of commissioners of,—see COVENANT.

TRUSTEES.

See FRIENDLY SOCIETY, 2, 3.

VARIANCE.

See AMENDMENT, 3.

WAIVER.

See ARREST, 3.

WAR.

Effect of declaration of.

1. A declaration of war by this country against a foreign power, imports a prohibition of commercial intercourse with the subjects of that power. *Barrick v. Buba*, 563
2. Held, therefore, that a plea to an action upon a charter-party made between a subject of this country and a Russian subject for loading a cargo at Odessa, a Russian port,—that, at the time of making the contract, the plaintiff was a subject of Great Britain and the vessel a British vessel, and the defendant a subject of Russia residing and carrying on trade there, and that, before the expiration of the time for the defendant to load the vessel according to the charter-party, and before any breach thereof, a state of war existed, and had ever since continued, between the two countries,—was a good answer. *Id.*
3. Held also, that a mere intimation by the agent of the charterer at Odessa to the master, before the time for loading had expired, that "he had ceded the charter-party, with all its rights and obligations," to a third person, and that he must address himself to such third person for a cargo, did not amount to a renunciation of the charter-party, so as to entitle the owner to sue as for a breach at that time. *Id.*

WARRANTY.

See AGREEMENT, 5, 6, 7. LETTERS PATENT, 2.

WOODS AND FORESTS.

Assent of commissioners of,—see COVENANT.

WRITS ON CONTRACT.

See REGULE GENERALES, 1.

WRIT OF ERROR.

See ERROR.

WRIT OF INQUIRY.

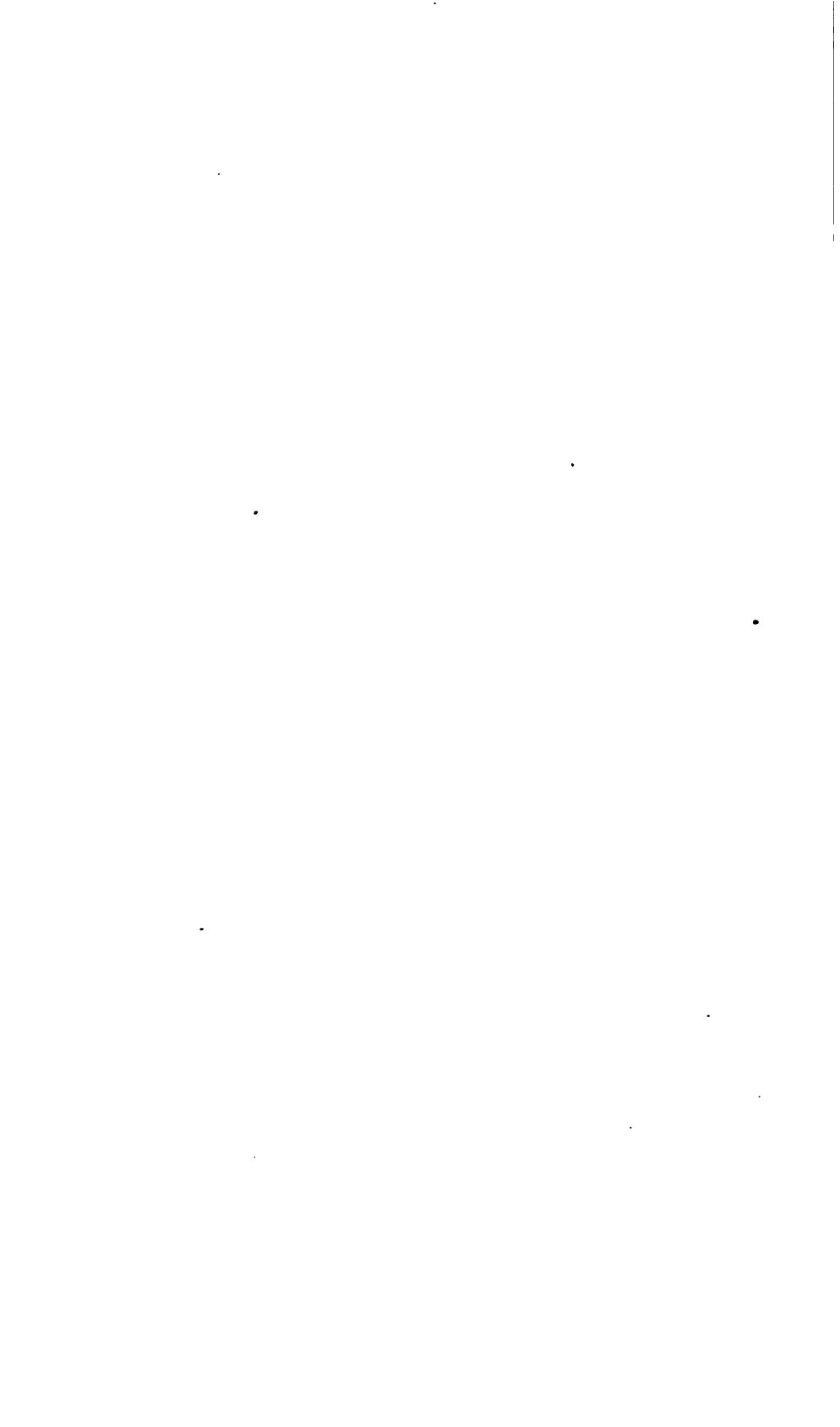
Percurat verdict.

Upon the execution of a writ of inquiry, in an action for dilapidations, two surveyors were called on each side: those called for the plaintiff estimated the dilapidations, the one at 119*l*, the other at 124*l*: those called for

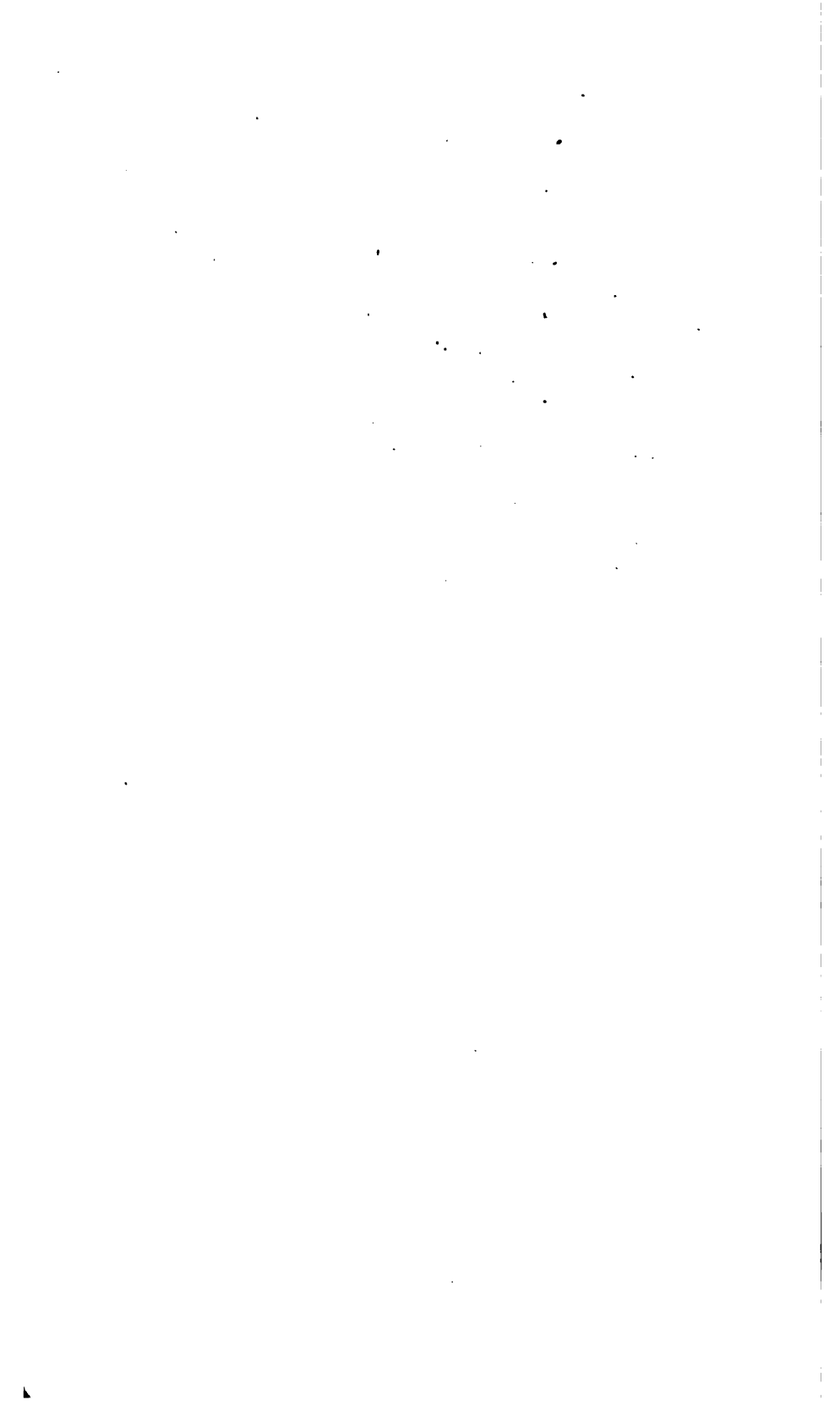
the defendant estimated them, the one at 63*l* 15*s*, the other at 68*l*: the jury returned a verdict for 36*l* 10*s*. :—The court ordered that the inquisition be set aside without costs, unless the defendant would consent to the verdict being entered for 63*l* 15*s*. *Wooding v. Mason*, 383

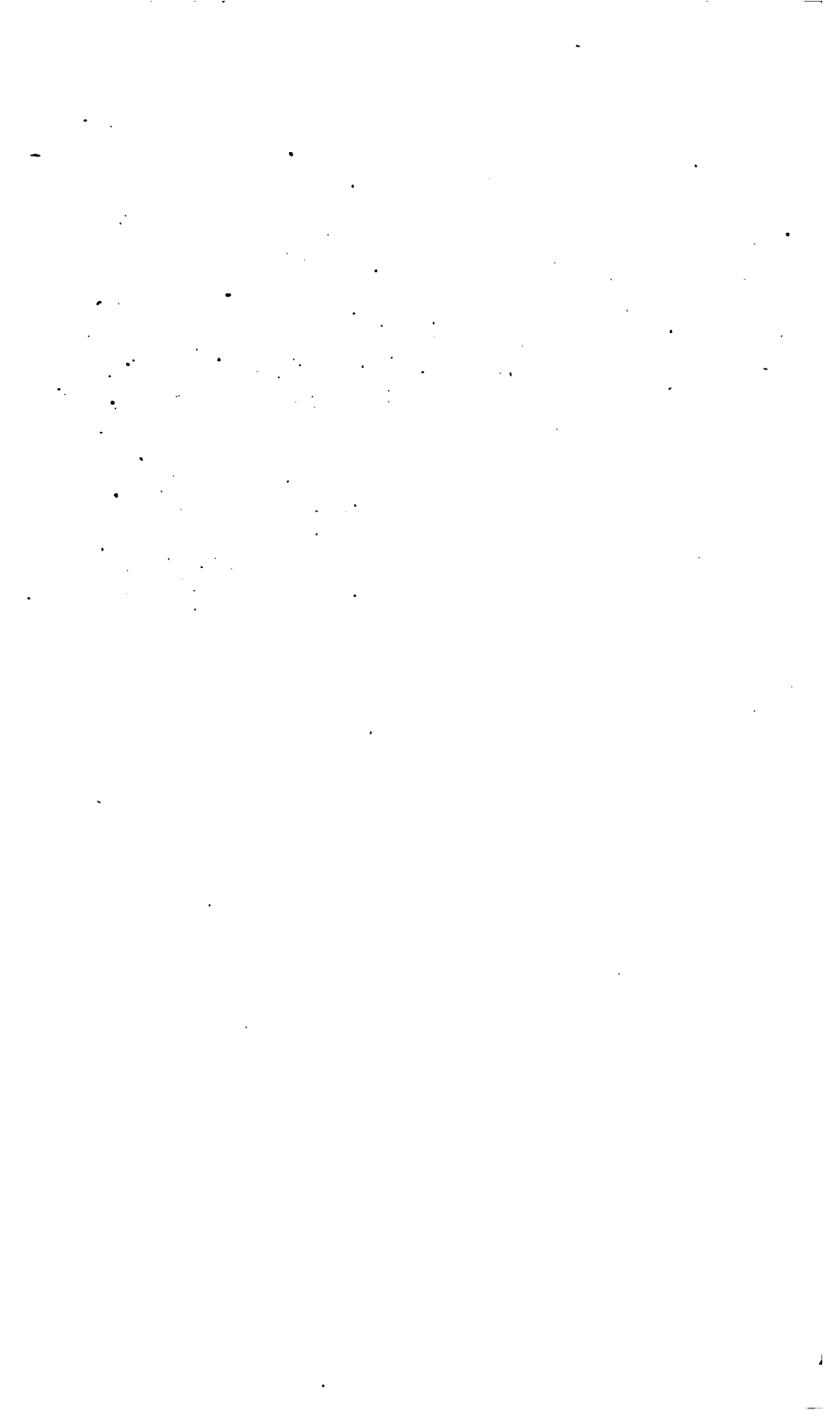
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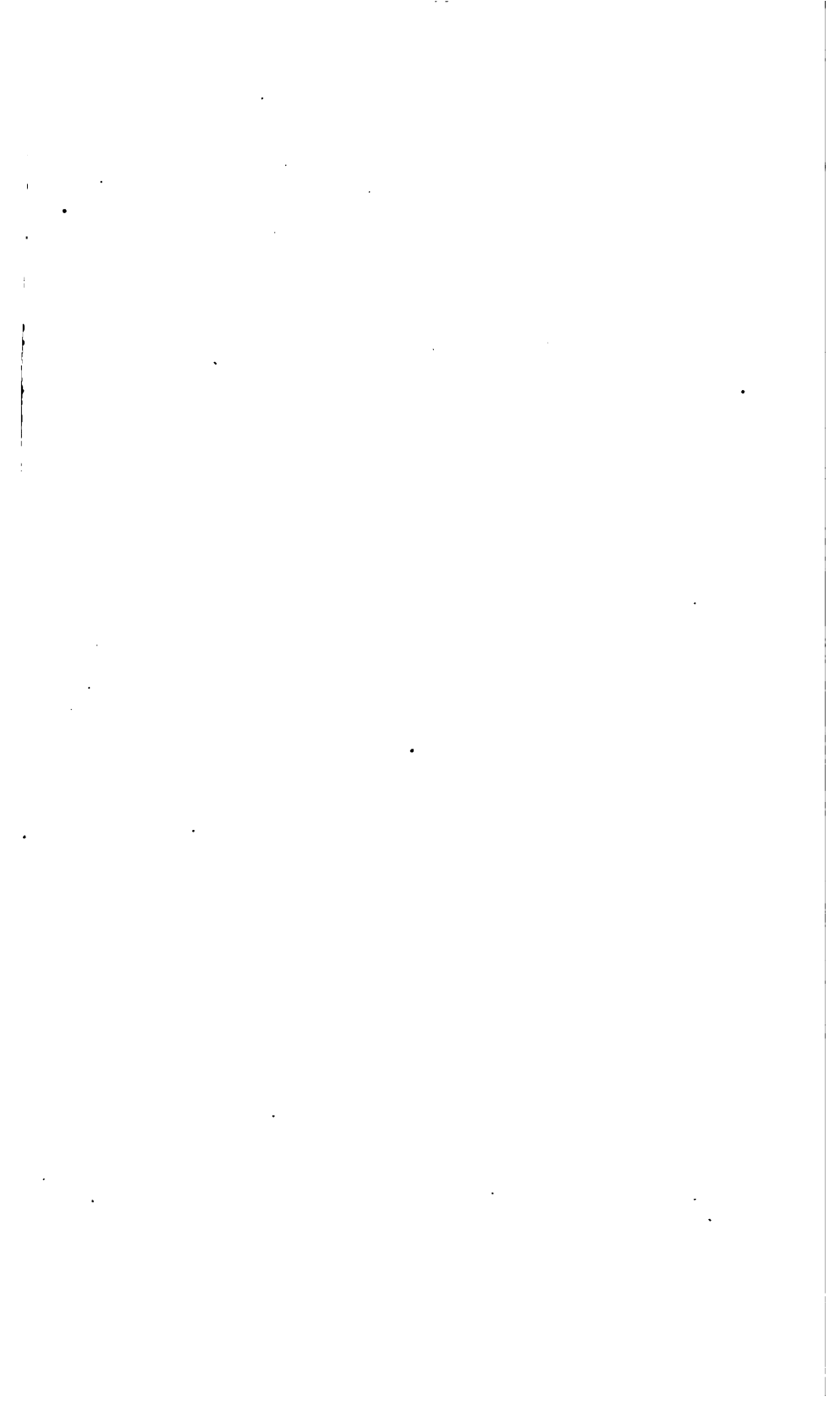


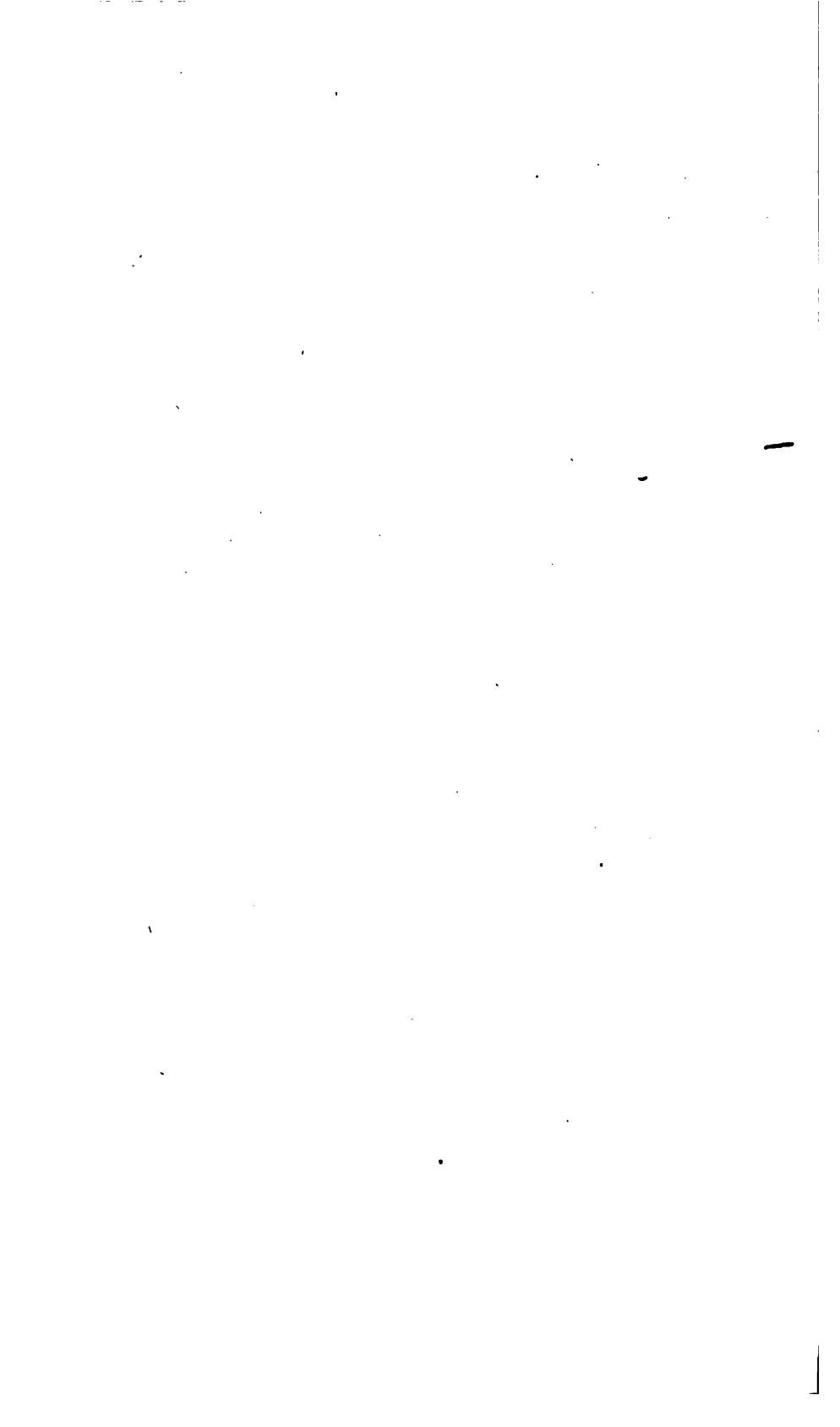


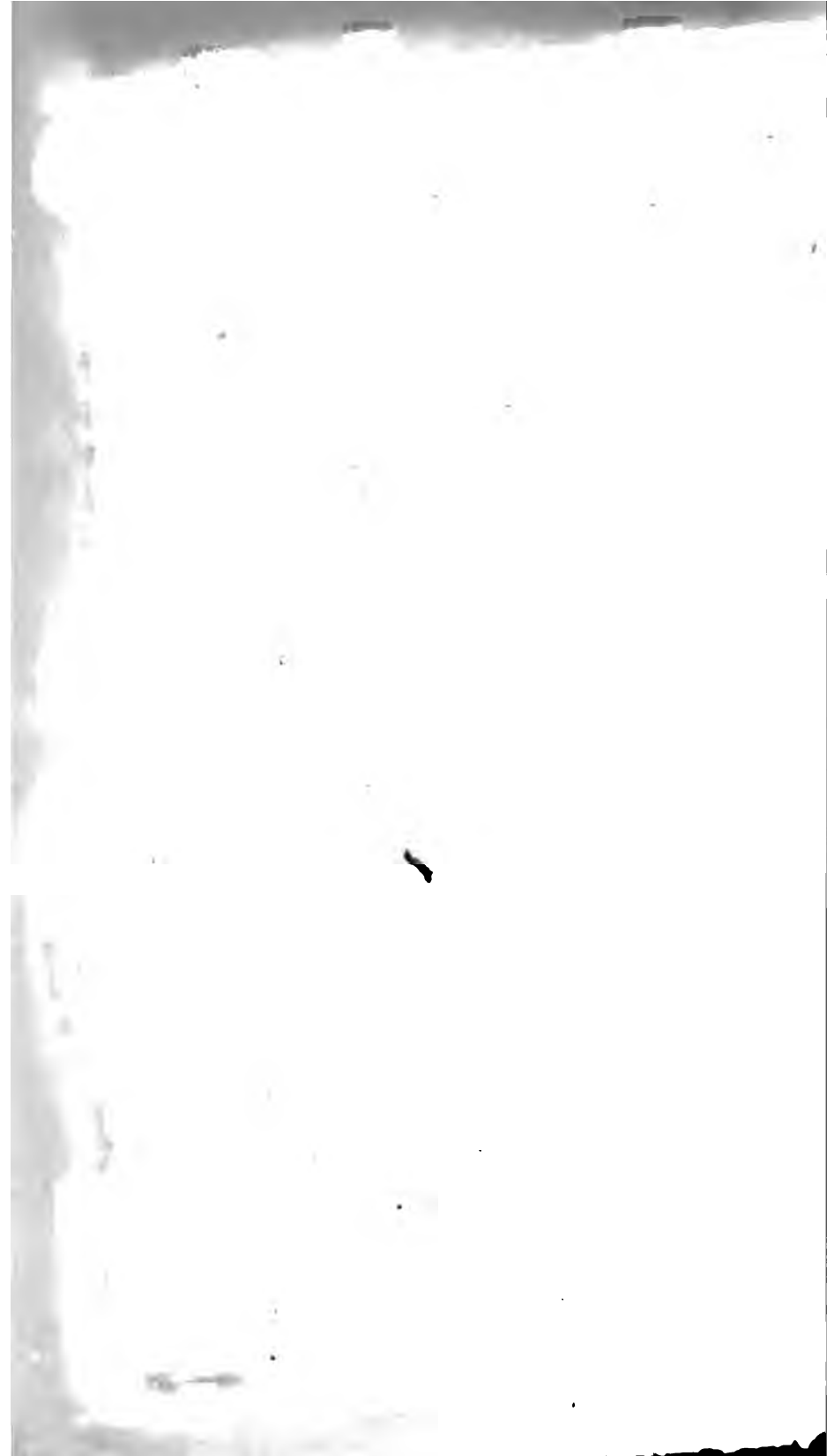




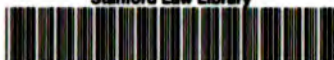








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